Petition

81-298

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, *Petitioner,*

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., *et al., Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 14, 1981

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QUESTIONS PRESENTED

The Federal Communications Commission, noting substantial industry progress in making the aural part of television intelligible to the deaf, and the significant, expensive and/or technologically complex modifications of regular broadcasts involved in such activity, ruled that television stations were not *required* so to modify their regular broadcasts to qualify for license renewal under Section 309 of the Communications Act of 1934, as amended. The Court of Appeals for the District of Columbia Circuit (per Wright, J.; McGowan J., dissenting), expressing "*our view* [that] television . . . should be made available to persons with impaired hearing *now*" (emphasis added), vacated the FCC's order as to Petitioner. The Court held that the national policy reflected in Section 504 of the Rehabilitation Act of 1973, as amended, must be embodied in the public interest standard of Section 309 of the Communications Act of 1934, as amended, governing grant of television station licenses, with the result that the Federal Communications Commission must evaluate in the context of licensing proceedings whether Petitioner's non-commercial television service for the deaf during the 1974-1977 license term complied with Section 504.

The questions presented are:

1. Whether Section 504 of the Rehabilitation Act of 1973, as amended, requires Petitioner (or other non-commercial television stations) to take affirmative action to modify its broadcasts to make the aural portions accessible to the deaf?

2. Whether the D.C. Circuit erred by directing the FCC to incorporate the Court's expansive interpretation of Section 504 into the public interest standard of

Section 309 of the Communications Act, as amended, governing Federal Communication Commission action on television station license applications and apply it to Petitioner's 1977 license renewal application?

LIST OF PARTIES

The following is a list of all parties that appeared before the Court whose judgment is sought to be reviewed: Mrs. Sue Gottfried; Greater Los Angeles Council on Deafness, Inc.; Federal Communications Commission; American Broadcasting Companies, Inc.; CBS, Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Company, Inc.; RKO General, Inc.; and Petitioner Community Television of Southern California.

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SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., *et al., Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Community Television of Southern California ("KCET"), licensee of a non-commercial educational television station in Los Angeles, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of a divided panel of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 17, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (per Wright, J.; McGowan, J., dissenting), not yet reported, is reprinted in Appendix A, pp. 1a-40a, *infra.* It affirmed those portions of orders

and opinions of the Federal Communications Commission ("FCC") concerning license renewal applications of seven commercial television stations in Los Angeles, but vacated and remanded for further proceedings those portions of the orders and opinions concerning Petitioner KCET's renewal application. The FCC's orders and opinions are reported at 69 F.C.C.2d 451 (1978), *recon. denied,* 72 F.C.C.2d 273 (1979), reprinted in Appendix B, pp. 41a-67a, *infra.*

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on April 17, 1981. KCET's and the FCC's timely petitions for rehearing and suggestions for rehearing *en banc* were denied on July 8, 1981, although some judges voted for rehearing. See Appendix C, pp. 69a-72a, *infra.* The Court of Appeals stayed issuance of its mandate pending the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as amended, and Section 309 of the Communications Act of 1934, 47 U.S.C. §309, as amended, appear in Appendix D, pp. 73a-78a, *infra.*

STATEMENT OF THE CASE

Respondents Sue Gottfried and the Greater Los Angeles Council on Deafness ("Gottfried") petitioned the FCC under 47 U.S.C. §309 to deny license renewal applications of KCET and seven Los Angeles commercial television stations for three-year terms beginning December 1, 1977. Gottfried's core allegation was that

the stations had a duty under Section 504 of the Rehabilitation Act of 1973, as amended, to modify their broadcast programming to include written captions or subtitles to make the programs understandable to the aurally handicapped. Gottfried maintained that the stations had not captioned enough of their programming during the 1974-1977 license term under review, that this violated Section 504, and that such violation precluded the FCC from finding under Section 309 of the Communications Act of 1934, as amended, that grant of the renewal applications would serve the public interest (A. 49a-52a).[1]

KCET's uncontroverted showing before the FCC was that during the 1974-1977 license term it had broadcast more than 960 programs for the deaf which had subtitles or captions, or were accompanied by sign language interpretations, or, in rare instances, contained no spoken words (KCET Opposition to "Petition to Deny Renewal License," pp. 2-3). This was an average of more than six programs per week whose aural portion was made understandable to the deaf during the license term.

Gottfried's petitions were denied (A. 53a). The FCC found no shortcomings in the KCET service to the deaf. The FCC's Memorandum Opinion and Order traced the agency's efforts to encourage and facilitate access for the deaf to the aural portion of television service, including authorization of experiments with closed-captioning technology, some of which predated enactment of Section

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[1] There are two types of television "captioning." "Closed" captions are visible only on television receivers equipped with a special decoder; "open" captions are visible on all receivers (A. 45a-46a). Gottfried advocated open captions.

504 (A. 45a-47a). The FCC explained that programming with visual aids for the deaf requires specialized techniques and that the technology was evolving with many technical and financial questions still unanswered. It also relied heavily on its 1976 decision that, in view of those circumstances, no licensee would be required to "provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information" (A. 46a-47a).

The FCC went on to hold that Section 504 did not apply to the seven commercial stations and that, if Section 504 did apply to KCET, it was not the proper agency to enforce it.[2] The FCC noted that the Department of Health, Education and Welfare ("HEW"), which then was responsible for enforcement of Section 504, had not found any violation of that statute by KCET. The FCC made clear that in future licensing proceedings it would take into account such a finding (A. 52a).

Gottfried's petition for reconsideration under 47 U.S.C. §405 also was denied (A. 67a). The FCC reaffirmed that a challenge to KCET's license renewal based on Section 504 was premature, noting that Gottfried's Section 504 complaint against KCET was still pending at HEW (A. 62a). Pointing to successful voluntary industry captioning experiments, and to other important advances that were improving TV access for the deaf, the FCC was convinced that more captioned programs would soon be available (A. 67a). Under these circumstances the FCC concluded that to reverse its 1976 decision, and

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[2] The rationale for direct application of Section 504 to KCET is to deem KCET a recipient of federal financial assistance. The FCC did not hold, and KCET does not concede, that it is such a recipient within the meaning of Section 504.

after-the-fact to hold KCET and other stations to a captioning duty during their 1974-1977 license periods, would "raise serious questions of fundamental fairness" (A. 64a). However, the FCC made clear that rule making might be undertaken if its expectations for the success of closed captioning proved erroneous (A. 66a-67a).

Gottfried's appeal to the D.C. Circuit under 47 U.S.C. §402(b) placed increased emphasis on the concept that, if Section 504 were not directly enforceable by the FCC, the FCC nonetheless was required to include the "national policy" reflected in Section 504 within the general public interest standard of Section 309 of the Communications Act, which the FCC does directly enforce. Despite adopting that concept, the D.C. Circuit unanimously affirmed the FCC's decision as to the seven commercial stations. However, by a divided vote the Court (Wright and Gasch, JJ.; McGowan, J., dissenting) reversed and remanded as to KCET (A. 1a-40a). The Court found no discrimination by KCET against the deaf. It did not cite and appears to have overlooked the record evidence of KCET's service to the deaf which during the license term at issue far exceeded that of any of the commercial stations.[3]

Expressing "*our view* [that] television . . . should be made available to persons with impaired hearing *now*" (A. 15a, emphasis added), the Court held that Section 504 obliged KCET (and presumably all 300 other non-

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[3] The disparate treatment of KCET was said to be based on the fact that KCET, unlike the commercial stations, is a recipient of federal funds (A. 15a-19a). Judge McGowan's dissent pointed out that "form is favored over substance when commercial stations are, for this reason, spared the expense and uncertainty of renewal hearings, and a non-commercial station is not" (A. 40a).

commercial educational television stations) to take the substantial affirmative action necessary to make all or some unspecified lesser part of the aural portions of its broadcast programming accessible to the deaf. Although the Court noted that "rulemaking might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons of impaired hearing" (A. 4a), it followed a different route as to KCET.

The Court directed the FCC to decide in connection with KCET's 1977 license renewal application whether KCET had complied with the Court's reading of KCET's Section 504 duty during the 1974-1977 term. The D.C. Circuit reached this result despite the FCC's 1976 decision that there was then no such duty and even though no Section 504 compliance standards for television stations had been promulgated by any government funding agency. The Court went on to hold that the "national policy" reflected in Section 504 *must* be incorporated into the "public interest" standard of 47 U.S.C. §309, with the result that *all* TV stations must provide special service for the deaf in the future. The D.C. Circuit did not determine precisely how commercial stations were to be held to account for their duty under the same Section 309 that applied to KCET.

Judge McGowan dissented because of the "vastly different burden imposed" on KCET, noting that none of the stations

> "had advance notice during their expired license terms of what was, and therefore could reasonably be, expected of them with respect to the wholly laudable, but technically complex, objective of providing access to the hearing-impaired" (A. 40a).

Although KCET's and the FCC's petitions for rehearing and suggestions for rehearing *en banc* were denied, Judge McGowan voted for rehearing and Judges Robb and McKinnon voted for rehearing *en banc* (A. 69a-72a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Extends The Scope Of Section 504 Of The Rehabilitation Act Well Beyond Limits Established By This Court In *Southeastern Community College* v. *Davis;* Together With Other Decisions, It Indicates Confusion In The Lower Courts, Which This Court Should Dispel, As To Whether Section 504 Prohibits Discrimination Or Also Imposes Affirmative Action Duties.

Only two years ago this Court unanimously held that Section 504 of the Rehabilitation Act of 1973 prohibited discrimination against the deaf but did *not* impose on recipients of federal financial assistance the affirmative action obligation of making costly modifications to programs or activities in order to accommodate the deaf. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405, 411, 413 (1979). *See also University of Texas* v. *Camenisch,* 101 S.Ct. 1830 (1981) (Burger, C. J., concurring). Subsequent lower court decisions, including the decision below, exhibit confusion as to the meaning of Section 504, making it impossible for federal grant recipients to know with reasonable certainty the scope of their legal duties. A decision by this Court is needed to provide lower courts and thousands of federal grant recipients with definitive guidance on the meaning of this important statute that affects several million hearing-impaired Americans, additional millions of other handicapped citizens, as well as the scores of millions of

persons in the nation as a whole who are affected to varying degrees by government regulation in this area.

Divergent applications of Section 504 have emerged in the lower courts since the watershed decision in *Davis*. On the one hand, some courts, like the D.C. Circuit below, have persisted in using Section 504 to justify imposition of costly affirmative obligations on recipients of federal financial assistance in apparent disregard of *Davis*. *E.g.*, *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1979), *rev'd on other grounds*, 101 S.Ct. 1830 (1981); *Tatro* v. *State of Texas*, 625 F.2d 557 (5th Cir. 1980). Other courts, more correctly it appears, have read *Davis* to mean that Section 504 does not require significant expenditures of funds or efforts to serve or include the handicapped. *E.g.*, *American Public Transit Association* v. *Lewis*, No. 80-1497 (D.C. Cir. May 26, 1981); *Dopico* v. *Goldschmidt*, 80 Civ. 4562 (S.D.N.Y. July 24, 1981).[4]

The Court of Appeals below read Section 504 as creating a broad national "policy" of fostering inclusion of the handicapped in the mainstream of American daily life no matter the cost. In its view this national policy was so important that it must be treated as an essential element of the public interest standard of Section 309 of the Communications Act, with the FCC required to enforce on television stations a duty of making their programming *immediately* available to the hearing-impaired.[5] The Court of Appeals made no attempt to

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[4] Comparison of *American Public Transit Association* v. *Lewis* with the case below illustrates the serious confusion as to the scope of Section 504 within just the D.C. Circuit in cases decided by different panels less than six weeks apart.

[5] The Court of Appeals did not expressly state that KCET must caption or sign programming for the deaf, but its message seems

address the cost or impact of this requirement or to reconcile its decision with this Court's holding in *Davis*, although the record showed that providing visual aids for the aural portion of television programs was technologically complex, relatively expensive, and required significant modifications of regular programming (A. 51a).[6]

Davis emphasized the Congressional distinction between "the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." 442 U.S. at 410. The D.C. Circuit ignored that distinction below.[7] It also ignored "the well-settled distinction between Congressional 'encouragement' " of programs by recipients of federal funds "and the imposition of binding obligations" on them to take affirmative action, which this Court lately

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unmistakable. The Court did say: "[i]t is time . . .that the benefits of television be made available to the hard of hearing now" (A. 4a); Section 504 requires stations to "attempt to serve the interests of the nation's hearing impaired minority" (A. 20a); and stations have a "duty to make reasonable efforts to serve the handicapped" (A. 26a). Since service to the deaf is not possible without captioning or signing, the Court in effect imposed a requirement to caption or sign.

[6] The Court made passing reference to language in *Davis* recognizing that the line between affirmative action and unlawful discrimination may at times be difficult to draw, especially in the face of evolving technology. 442 U.S. at 412-14. The record in this case, reflecting the development of captioning and KCET's provision of captioning and other aids for the hearing-impaired, clearly does not raise an issue of discrimination.

[7] *See also* University of Texas v. Camenisch, 101 S.Ct. 1830 (1981) (Burger, C.J., concurring), warning that regulations implementing Section 504 must not "go beyond the carefully worded *nondiscrimination* provision of §504 . . .." 101 S.Ct. at 1835-36. Although KCET relied on *Camenisch* on rehearing, the Court of Appeals did not heed the Chief Justice's warning.

emphasized in *Pennhurst State School and Hospital* v. *Halderman*, 101 S.Ct. 1531, 1544 (1981).[8] The Congress obviously was aware of the needs of the deaf when it adopted Section 504 "and plainly understood the difference, financial and otherwise, between encouraging a specified type of [activity] and mandating it." 101 S.Ct. at 1545. By insisting that KCET caption or sign its programs, and do so "now," the Court of Appeals erroneously transformed the precatory language of Congressional encouragement in Section 504 into a definite legal duty.

The decision below stands in sharp contrast to *American Public Transit Association* v. *Lewis*, No. 80-1497 (D.C. Cir. May 26, 1981), in which another panel of the D.C. Circuit invalidated Department of Transportation regulations dealing with bus access for the handicapped because "extensive modifications of existing systems" and "extremely heavy financial burdens" could not be imposed under Section 504 (slip op. at 12). More recently, Judge Weinfeld has held that "the clear overreaching principle in *Davis*" is that Section 504 "does not require massive expenditures" by recipients of federal funds. *Dopico* v. *Goldschmidt,* 80 Civ. 4562 (S.D.N.Y. July 24,1981) (slip op. at 29-30).

Review by this Court would be appropriate now. *Davis* held that it was an unlawful extension of affirmative action to require a college to alter its academic program in order to accommodate a deaf student. *A fortiori*, it was an unlawful extension of affirmative action

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[8] As *Pennhurst* was handed down after entry of the decision below, summary reversal for further consideration in light of *Pennhurst* would not be an inappropriate alternative to review on the merits.

tion for the D.C. Circuit in this case to order the FCC to ensure that KCET undertake the far more expensive and complex task of captioning or signing its programs for the deaf.

If unreviewed, the decision below will have impact far beyond the facts and litigants of this case. If KCET must caption its programs, so too must some 300 other non-commercial educational television stations across the country. We are in a time of significant financial constraints for non-commercial television stations. Mandatory captioning or signing of programs would divert a significant part of their scarce resources to serve a comparatively small segment of the total non-commercial television audience to the detriment of the total program service and the total audience.

2. The Court Needs To Overrule The D. C. Circuit's Usurpation Of The FCC's Broad Discretion To Interpret And Enforce The Public Interest Which This Court, In *FCC* v. *WNCN Listeners Guild* And Other Cases, Has Insisted Must Be Protected From Excessive Judicial Second Guessing.

The Court of Appeals below rejected the FCC's reasoned conclusion that KCET (and other television stations) need not presently caption or sign programs (except to broadcast emergency information) to qualify for license renewal under the "public interest" standard of 47 U.S.C. §309. By holding that the "national policy" reflected in Section 504 *must* by a component of the "public interest" *and* that the FCC *must* measure Section 504 compliance in license renewal proceedings, the D.C. Circuit substituted its view of the public interest for that of the FCC. The D.C. Circuit thus turned its back on an unbroken line of this Court's cases, the most recent of which is *FCC* v. *WNCN Listeners Guild,* 101

S.Ct. 1266 (1981). In doing so, the D.C. Circuit has created new doubt and confusion on two fundamental issues of administrative law: *first,* the extent of the FCC's discretion to decide how and under what circumstances to consider public policies reflected in other federal statutes, and, *second,* the limits on judicial review of the FCC's reasoned exercise of its discretion.[9]

A. The FCC, not the Court of Appeals, must choose the components of the public interest standard. The Communications Act does not define the "public interest"; rather it is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The FCC may implement its view of the "public interest" "so long as that view is based on consideration of permissible factors and is otherwise reasonable." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978). This is especially true where, as here, the technology is new, constantly evolving and still at its experimental stage. *Philadelphia Television Broadcasting Co.* v. *FCC*, 123 U.S. App. D.C. 298, 300, 359 F.2d 282, 284 (1966). *See also Network Project* v. *FCC*, 167 U.S. App. D.C. 220, 511 F.2d 786 (1975); *Connecticut Committee Against Pay TV* v. *FCC*, 112 U.S. App. D.C. 248, 250, 301 F.2d 835, 837 (1962).

There were no "compelling indications" that the FCC's decision not to incorporate Section 504 into the public interest standard of Section 309 was wrong at this time. *CBS, Inc.* v. *FCC*, 101 S.Ct. 2813, 2827 (1981).

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[9] It is particularly important for this Court to review the D.C. Circuit's action, for that Court of Appeals handles an especially high proportion of federal administrative law cases and all FCC licensing cases (*see* 47 U.S.C. §402(b)).

Accordingly, the D.C. Circuit should not have second-guessed the agency. *FCC* v. *WNCN Listeners Guild*, 101 S.Ct. at 1274. Nothing in the Communications Act or its legislative history suggests that every "national policy" must become a component of the public interest, nor is there anything in Section 504 or its legislative history to suggest that the particular "national policy" reflected therein must be read into Section 309. "[T]he use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976).[10]

The record supports the wisdom of the FCC's approach in this case. The use of visual aids for television viewing by the hearing-impaired raises an array of technical, financial and policy questions.[11] The technology is in its formative stages. There is no consensus among broadcasters or the hearing-impaired on how best to serve that segment of the viewing public. There is no agreement on the proper role of the federal government

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[10] The FCC *may* take clearly established "national policies" into account in licensing decisions, but it is not *required* to do so. *FCC* v. *NCCB*, 436 U.S. at 795.

[11] The Department of Education (ED) has conducted an inquiry as to the effect of Section 504 on non-commercial television stations. Dep't of Education, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 46 Fed. Reg. 4954 (January 19, 1981), corrected 46 Fed. Reg. 18321 (March 24, 1981). Among the issues on which comment was soucht by ED were: (1) whether the aural portion of some or all programs must be made accessible to the deaf: (2) whether making the aural portion of programs accessible to the deaf would adversely affect the visual portion of programs; (3) the technological feasibility of serving the deaf; (4) the cost of service; and (5) whether resources are available to provide access. 46 Fed. Reg. at 4955.

in the effort, or on how the needs of the hearing-impaired should be balanced against those of other viewers who may find visual aids distracting. Particularly under these circumstances it was wholly rational for the FCC to permit the voluntary and cooperative efforts of broadcasters to evolve in this almost virgin field without additional government interference.

The Court of Appeals' second guessing of the FCC cannot be justified by a perceived insensitivity of the FCC or KCET to the matter of television service for the hearing-impaired. In its two opinions below, the FCC detailed its work in this area going back to 1970 (A. 45a-46a). And KCET's programming efforts for the hearing-impaired were substantial despite Gottfried's claims that they were not enough. (*See* page 3 *supra*.)

In another context, this Court recently observed that the role of the federal judiciary in the review of administrative decisions must necessarily be limited. Agency decisions may be set aside "only for substantial procedural or substantive reasons as mandated by statute" and not because the result reached was one which the Court of Appeals might not have preferred. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978). This is especially true in the area of communications where the need for judicial leeway in the face of expert agency knowledge is particularly important. The decision below loses sight of these principles and raises important and likely recurring issues of administrative law which only this Court can resolve.[12]

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[12] The Commission's past treatment of antitrust and equal employment opportunity does not require the FCC to make Section 504 part of the "public interest." Antitrust policies play a special role in FCC licensing as they lie at the core of Congress' decision to

B. Apart from its serious substantive error in ordering incorporation of Section 504 policy into the public interest standard of Section 309 of the Communications Act, the Court of Appeals also erred by directing the FCC to apply that court-ordered interpretation retroactively to KCET (and perhaps other non-commercial educational license renewal applicants) in a licensing context. The Court conceded that prospective enforcement of its interpretation of Sections 504 and 309 through a rule making proceeding "might be a better, fairer and more effective" approach to the problem (A. 4a). It is puzzling that the Court chose a different route for KCET.

It is the goal of the Communications Act "to secure the maximum benefits of radio to *all* the people of the United States." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943) (emphasis added). But the FCC has "broad discretion in determining how that goal could best be achieved." *FCC* v. *WNCN Listeners Guild,* 101 S.Ct. at 1274. A court should not substitute its view of the means for goal achievement for the reasoned view of the FCC. *FCC* v. *NCCB,* 436 U.S. at 793.

Here the D.C. Circuit overruled the FCC's decision to wait for the appropriate funding department to issue

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regulate broadcasting. *FCC* v. *Pottsville*, 309 U.S. at 137. *See, e.g.*, 47 U.S.C. §313. Although this Court has recognized the FCC's authority to formulate and enforce its own EEO standards, *NAACP* v. *FPC*, *supra*, 425 U.S. at 670, n.7, it has not compelled the FCC to do so. Here, the panel usurped the FCC's choice. Moreover, the FCC itself has disclaimed any "sweeping mandate to further the 'national policy' against [employment] discrimination . . ." Nondiscrimination in Employment Practices (Broadcast), 60 F.C.C.2d 226, 229 (1976).

general Section 504 guidelines for television stations and to act on a pending Section 504 complaint against KCET before holding KCET to account in the license renewal process. In so doing the Court undermined an important component of the public interest — the need to avoid uncertainty, unfairness and disruption of licensees. *FCC* v. *NCCB*, 436 U.S. at 804. As Judge McGowan observed, KCET did not have advance notice of what was expected of it (A. 40a) and, as the FCC pointed out, retroactive formulation and application of Section 504 standards to KCET would "raise serious questions of fundamental fairness" (A. 64a). This alone was sufficient reason for the FCC not to regulate and the D.C. Circuit should not have second-guessed it. *FCC* v. *WNCN Listeners Guild,* 101 S.Ct. at 1273-74.

Neither the Communications Act nor the decisions of this Court requires the FCC to achieve the goals of the Communications Act through the licensing process. Indeed, *FCC* v. *WNCN Listeners Guild* holds that the FCC may not be required by the D.C. Circuit to achieve a public interest goal by adjudicating license applications if the FCC reasonably selects a different course. It appears that this Court once again must protect the FCC's broad discretion to decide not only *what* policies should be pursued in promoting the public interest, but also *how* it should make its public interest determinations. 101 S.Ct. at 1277.[13]

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[13] Even when the FCC has included a "national policy" in the "public interest," it may proceed prospectively by rule making having industry-wide application instead of by retrospective individual licensing cases. Hale v. FCC, 138 U.S. App. D.C. 125, 129, 425 F.2d 556, 560 (1970). *See* SEC v. Chenery, 332 U.S. 194, 202-03 (1947). That the rule making here is underway at ED rather than the FCC should make no difference, for funding agencies such as ED, not the FCC, have the responsibility to interpret the Section 504 duties of the recipients of its funds.

Contrary to the explicit teaching of *FCC* v. *WNCN Listeners Guild,* 101 S.Ct. at 1274, the D.C. Circuit ignored the FCC's "rational explanation" for its decision not to attempt at this time to measure KCET against Section 504, either directly or though Section 309. The FCC's reasons were these: (a) specialized programming techniques are required to serve the deaf and they raise many difficult technical and financial questions (A. 44a-47a); (b) voluntary industry projects in cooperation with ED and the FCC have resulted in "important advances" in deaf access to television (A. 67a); (c) time is needed to make more progress (A. 67a); (d) the future is not certain (A. 46a); (e) FCC rule making is possible if industry efforts are unproductive (A. 67a); and (f) it would be unfair to impose compliance standards retroactively (A. 64a). Moreover, KCET's substantial service to the deaf during the 1974-1977 license term provided the FCC assurance that the deaf would not be ignored while the overall scheme under Section 504 developed further. The Court of Appeals incorrectly usurped the FCC's authority to give "broadcasters room to exercise their discretion [while] demanding that they act in good faith." *CBS* v. *FCC,* 101 S.Ct. at 2827 (footnote omitted).

Finally, the Court of Appeals denied the FCC the required judicial deference to agency flexibility, expertise and discretion. Television service to the deaf involves a complex matrix of technical, financial and policy issues for which presently there may be more questions than answers. The administrative process is ideally suited to tackling such issues. But the D.C. Circuit limited the FCC's use of such regulatory tools as the "expert knowledge" that enables the agency to forecast the direction in which the future public interest lies, *FCC* v. *NCCB,*

436 U.S. at 814; the facility to predict the probable conduct of licensees, *FCC* v. *WNCN,* 101 S.Ct. at 1275; and the "ability to adapt to new circumstances in a flexible manner." *FCC* v. *NCCB,* 436 U.S. at 811.

The decision below has confused "the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of radio broadcasting in the Communications Act . . . ." *FCC* v. *Pottsville,* 309 U.S. at 136-37. The lower federal courts and the FCC need this Court's further guidance on this evidently recurring and important issue.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 14, 1981

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Appendix

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1722

SUE GOTTFRIED, Individually and on Behalf of the Deaf and Hearing Impaired Population Within the Stations' Viewing Area, and GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

NATIONAL BROADCASTING COMPANY, INC., COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, METROMEDIA, INC., AMERICAN BROADCASTING COMPANIES, INC., KCOP TELEVISION, INC., RKO GENERAL, INC., GOLDEN WEST BROADCASTERS, and CBS, INC., INTERVENORS

Appeal from Orders of the
Federal Communications Commission

Argued November 5, 1980

Decided April 17, 1981

Judgment entered this date ←

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Abraham Gottfried and *Charles M. Firestone* for appellants.

Randolph J. May, Counsel, Federal Communications Commission, with whom *Robert R. Bruce*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Keith H. Fagan* and *Mary Lee Lindquist*, Counsel, Federal Communications Commission, were on the brief, for appellee. *Lisa B. Margolis*, Counsel, Federal Communications Commission, entered an appearance for appellee.

Timothy B. Dyk, with whom *J. Roger Wollenberg* and *Judith Barry Wish* (for intervenor CBS, Inc.), *James A. McKenna, Jr.*, *Mark D. Roth*, and *Carl R. Ramey* (for intervenor American Broadcasting Companies, Inc.), *Michael J. McCarthy* (for intervenor Golden West Broadcasters), *Howard F. Roycroft*, *Richard S. Rodin*, and *Marvin J. Diamond* (for intervenor KCOP Television, Inc.), *Thomas J. Dougherty* and *Preston R. Padden* (for intervenor Metromedia, Inc.), *Bernard Koteen*, *Arthur B. Goodkind*, and *Howard Monderer* (for intervenor National Broadcasting Company, Inc.), and *J. Laurent Schaff* and *Jack N. Goodman* (for intervenor RKO General, Inc.) were on the joint brief, for intervenors CBS, Inc. *et al.* *Margot Smiley Humphrey* entered an appearance for intervenor National Broadcasting Company, Inc.

Edgar F. Czarra, Jr. and *Mark D. Nozette* were on the brief for intervenor Community Television of Southern California.

Before MCGOWAN, *Chief Judge*, WRIGHT, *Circuit Judge*, and GASCH,* *District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Opinion concurring in part and dissenting in part filed by *Chief Judge* McGowan.

WRIGHT, *Circuit Judge*: This case, involving denial by the Federal Communications Commission (FCC or Commission) of a petition to deny license renewals to eight Los Angeles television stations,[1] presents difficult questions concerning the obligations of public and commercial broadcasters to attempt to meet the programming needs of persons with impaired hearing. The issues arise under two statutes: the Communications Act,[2] under which the Commission can renew a station's license only upon a finding that its programming has served the public interest, and Section 504 of the Rehabilitation Act of 1973,[3] which prohibits discrimination against "otherwise qualified" handicapped persons by recipients of federal financial assistance. Because public television stations are apparently bound by Section 504 of the Rehabilitation Act to provide service to "otherwise qualified" handicapped persons, we do not believe that the FCC could find the service of such stations to be adequate to justify renewal without at least inquiring specifically into their efforts to meet the programming needs

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[1] There are seven commercial stations and licensees involved: KABC-TV, American Broadcasting Companies, Inc.; KCOP-TV, KCOP Television, Inc.; KHO-TV, RKO General, Inc.; KNBC-TV, National Broadcasting Co., Inc.; KNXT-TV, CBS, Inc.; KTLA-TV, Golden West Broadcasters; and KTTY-TV, Metromedia, Inc. The eighth station is a noncommercial or public station, KCET-TV, licensed to Community Television of Southern California.

[2] The Communications Act of 1934, ch. 652, 48 STAT. 1064, *as amended*, 47 U.S.C. § 151 *et seq.* (1976) (hereinafter cited to U.S. Code only).

[3] Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 STAT. 357, *as amended*, 29 U.S.C. § 794 (1976) (hereinafter cited to U.S. Code only). The provision is quoted in text at note 37 *infra*.

of the hearing impaired. Accordingly, we hold that the challenge to the license renewal of public station KCET-TV must be remanded to the Commission for further proceedings.

We conclude, however, that Section 504 does not apply directly to commercial broadcasters. We therefore hold that the decision of the Commission concerning the seven commercial stations may be upheld, on the basis of both the record compiled below and the Commission's representations of substantial progress in extending the benefits of commercial television to the hearing impaired. In so doing, however, we recognize that the Commission's statutory obligation to pursue the public interest requires it to protect the interests of the hard of hearing in having meaningful access to commercial broadcasting. We also note that rulemaking might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing. Radio has been available to the general public for over half a century, as has television for over a quarter century. But millions of Americans have lived and died during that time without being able to enjoy radio and television simply because their hearing was impaired. It is time for the Commission to act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now.

I. BACKGROUND

A. *Statutory Context*

This case, in which appellants challenge an FCC order denying a petition to deny license renewals to eight Los Angeles television stations,[4] arises against a com-

[4] *See License Renewal Applications of Certain Television Stations Licensed For and Serving Los Angeles, California*, 69 FCC2d 451 (1978) (*Order*) (*reprinted at* Joint Appendix (JA) 1), *reconsid. denied*, 72 FCC2d 273 (1979) (*Reconsideration*) (JA 11).

plex background of federal statutes and administrative action. The Communications Act of 1934 charges the Federal Communications Commission with granting broadcast licenses and license renewals.[5] The Commission does so pursuant to a general mandate to protect and advance "the public interest, convenience, and necessity."[6] Although this mandate is general, the Commission has in fact interpreted it through the issuance of a number of regulations and guidelines. These Commission guidelines typically govern decisions about whether to renew broadcast licenses in cases where there is no announced competitor for a license held by the applicant for renewal.[7] Although the statute provides that "[a]ny party in interest may file with the Commission a petition to deny any application,"[8] the Commission need generally hold no hearings unless the petition raises a "substantial and material question of fact"[9] concerning

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[5] *See* 47 U.S.C. §§ 307-309 (1976).

[6] *See* 47 U.S.C. §§ 307(d), 309(a), 309(d) (1976).

[7] It is well settled that the Commission, in order to obviate the need for repetitive hearings, may specify by rule the criteria that will govern its decisions. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-205 (1956); *American Tel. & Tel. Co. v. FCC*, 539 F.2d 767, 774-775 (D.C. Cir. 1976). The Commission is not, of course, permitted to proceed pursuant to rules that are inconsistent with the underlying intent and purpose of the Communications Act. *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1212-1214 (D.C. Cir. 1971).

[8] 47 U.S.C. § 309(d) (1976).

[9] *See* 47 U.S.C. §§ 309(d)(2), 309(e) (1976). Where the Commission specifies by rule the criteria that will govern its licensing decisions, *see* note 7 *supra*, questions falling outside the ambit of those rules will ordinarily not be regarded as substantial or material, unless the party opposed to the Commission's adopted policies asserts reasons sufficient to justify a change or waiver of the rules. *United States v. Storer Broadcasting Co., supra* note 7, 351 U.S. at 205; *American Tel. & Tel. Co. v. FCC, supra* note 7, 539 F.2d at 774.

the incumbent licensee's satisfaction of pertinent Commission standards. Where no question is raised concerning the station's compliance with Commission guidelines, renewal is generally granted without public hearing.

Both the courts and the FCC have construed the "public interest" standard for license awards to include a requirement that broadcasters endeavor to discover and to meet the programming needs of all significant groups within their areas of service.[10] The Commission publishes a list of specific groups whose needs must be "ascertained."[11] At least since 1970 it has urged licensees to make efforts to serve the hearing impaired,[12] a group estimated to include at least 13 million people, nationwide.[13] But the Commission has declined to in-

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[10] *See, e.g., Stone v. FCC*, 466 F.2d 316, 327-328 (D.C. Cir. 1972); *Amendment of the Primer on Ascertainment of Community Problems by Commercial Broadcast Applicants, Permittees and Licensees*, Docket No. 78-237 (April 4, 1980); *Ascertainment of Community Problems by Broadcast Applicants*, 53 FCC2d 3 (1975).

[11] *See Renewal Primer*, 57 FCC2d 418, Appendix D, 447 (1976). The 19 "ascertainment" categories mandate inquiries into the service needs of (1) agriculture, (2) business, (3) charities, (4) civic, neighborhood, and fraternal organizations, (5) consumer service organizations, (6) culture, (7) education, (8) the environment, (9) government, (10) labor, (11) the military, (12) minority and ethnic groups, (13) organizations of and for the elderly, (14) organizations of and for women, (15) organizations of and for youth and students, (16) professions, (17) public safety, health, and welfare, (18) recreation, and (19) religion.

[12] *See The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC2d 917 (1970).

[13] *See Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, Docket No. 20693, 63 FCC2d 378, 379 (1976).

clude the hearing impaired among the groups whose needs must specifically be consulted.[14] Nor has it ever promulgated guidelines requiring entertainment programming for the hard of hearing. The Commission has, however, insisted that emergency broadcasts must be made accessible to the deaf,[15] and, whenever individual broadcasters have sought Commission approval for innovative service to the hearing impaired, the Commission has given its approval.[16] For example, the Commission

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[14] The proposal that the handicapped should constitute a separate "ascertainment" category was specifically rejected in *Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, Docket No. 78-237, FCC 80-134 (released April 4, 1980).

[15] *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, Docket No. 20659, 61 FCC2d 18 (1976), *recondsid. denied*, 62 FCC2d 565 (1977).

[16] The most notable efforts in this area involve "closed captioning"—a method of subtitling, similar to that used in foreign language films, but different in that it can only be seen on television sets equipped with decoding units. In 1972 the Commission authorized the Public Broadcasting System to initiate experiments with closed captioning, and in 1976 it promulgated rules to permit closed captioning by any broadcaster. *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, supra* note 13. The Commission has also instituted a clearinghouse program to provide information that would assist licensees in employing persons with various handicaps. The clearinghouse furnishes research data and reports concerning equipment availability and modification, and about various means to increase employment of and service to the handicapped. *See Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*, Docket No. 21474, FCC 80-62 (released March 6, 1980).

in 1976 adopted rules to permit "closed captioning" for visual display of aural material accompanying television programs.[17] Pursuant to this grant of permission, the Public Broadcasting Service (PBS) and two of the commercial networks began in March 1980 to provide a total of up to 20 hours a week of programming captioned by the National Captioning Institute.[18] The FCC has also emphasized in its public pronouncements that "licensees can and will be responsive to the needs of their [hearing impaired] viewers, but it is still the responsibility of

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[17] *See* note 16 *supra.*

[18] Brief for appellee at 5. The two commercial networks that are participating are the American Broadcasting Co. (ABC) and the National Broadcasting Co. (NBC). According to the National Captioning Institute, the Fall 1980 schedule of closed captioned programs included the ABC series Love Boat, Barney Miller, Eight is Enough, Friday Night Movie, and Three's Company, and the NBC series Disney's Wonderful World, Little House on the Prairie, Diff'rent Strokes, and Sunday Big Event. More than 15 PBS series are also captioned. *See National Captioning Institute, Schedule of Closed-Captioned Programs Fall 1980* (1980). The third major commercial network, the Columbia Broadcasting System (CBS), is also involved in experimental efforts to provide the advantages of programming to the hard of hearing through a system known as "teletext." On July 29, 1980 CBS petitioned the FCC seeking a rulemaking leading to promulgation of rules that would allow television stations to undertake teletext transmission. *See Amendment of Part 73, Subpart E of the Rules Governing Television Broadcast Stations to Authorize Teletext,* RM-3727. "Teletext" is a generic name for systems that transmit letters, numbers, and other characters that can be made to appear on television screens equipped with special decoders. Because teletext could be used to provide information to the general public, CBS believes that it would ultimately be more useful to the hearing impaired, and also less expensive, than would a closed captioning system.

each licensee to determine how it can most effectively meet those needs." [19]

Although it has recognized that Section 504 of the Rehabilitation Act of 1973 may impose a statutory obligation on public television stations to accommodate at least some of their programming to the needs of the hearing impaired,[20] the FCC has thus far declined to take specific steps to enforce the Act.[21] The Department of Education has been officially designated as the agency to develop guidelines clarifying the specific obligations imposed on public broadcasters by Section 504.[22] The

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[19] *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, supra* note 13, 63 FCC2d at 389.

[20] *See Order, supra* note 4, 69 FCC2d at 459, JA 9.

[21] *See id.* at 458-459, JA 8-9; *Reconsideration, supra* note 4, 72 FCC2d at 276-280, JA 14-18.

[22] The responsibility was originally assigned to the Department of Health, Education and Welfare (HEW). *See* Executive Order 11914, 41 FED. REG. 17871 (April 28, 1976). Acting on the advice of HEW's Office of Civil Rights (OCR), Secretary Harris concluded in October 1979 that § 504 was applicable to public broadcasters receiving federal financial assistance, and she instructed OCR to develop compliance standards for public stations. No standards had yet been promulgated, however, when the Department of Education was established on May 4, 1980. Under the Department of Education Organization Act, Pub. L. No. 96-88, 93 STAT. 691 (1979), the Department of Education assumed responsibility for administration of programs that provide financial assistance for production of programs shown on public television. The HEW study group that was involved in preparation of § 504 compliance guidelines for public television was also transferred to the Department of Education, and it remains there, located in the office of the Assistant Secretary for Civil Rights.

On January 19, 1981 the Department of Education issued a *Notice of Intent to Develop Regulations* concerning the

FCC has indicated that if any broadcaster should be found by another agency of government to be in violation of Section 504, it would "consider the effect of that violation upon the licensee's qualifications." [23] But because it is not the agency responsible for enforcement of the Rehabilitation Act, the FCC has stated that it will not attempt to hold broadcasters to any obligations thereunder, at least until the responsible agency has spoken.[24]

B. *Factual Background*

Sue Gottfried is a hearing impaired member of the Los Angeles community. On October 28, 1977, on behalf of herself and others similarly situated, Mrs. Gottfried filed petitions to deny the license renewal applications of eight Los Angeles television stations.[25] In her petitions pertaining to the seven commercial licensees Mrs. Gottfried alleged generally that the stations had failed to ascertain or to meet the needs of the hearing impaired. She further argued that the stations, as re-

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rights of persons with impaired hearing to access to television programs. 46 FED. REG. 4954 (Jan. 19, 1981). It remains uncertain, however, when the rulemaking process will be completed. In *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.), the District Court ordered the Department to issue final regulations not later than February 17, 1981. But the District Court's order has been stayed by the Ninth Circuit, pending appeal. *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, d/b/a KCET-TV*, Nos. 80-5400 and 80-5445 (9th Cir. Dec. 19, 1980) (order staying order of lower court and ordering expedition of appeal).

[23] *Reconsideration, supra* note 4, 72 FCC2d at 278, JA 16.

[24] *Order, supra* note 4, 69 FCC2d at 458-459, JA 8-9; *Reconsideration, supra* note 4, 72 FCC2d at 276-280, JA 14-18.

[25] *See Order, supra* note 4, 69 FCC2d at 451-452, JA 1-2; JA at 29.

cipients of valuable federal licenses, had failed to satisfy obligations imposed on them by Section 504 of the Rehabilitation Act of 1973. Regarding the public station KCET-TV, Mrs. Gottfried repeated her general claims and arguments, but she also added the specific charge that the station had shown indifference to the needs of the deaf by failing to broadcast, through most of its license term, a captioned version of the ABC Evening News that was made available to it by the Public Broadcasting Service.[26]

On September 8, 1978 the FCC denied Mrs. Gottfried's petitions to deny license renewals to the eight stations.[27] The petitions, the Commission said, had "failed to allege specific facts which raised any substantial or material question as to whether a grant of the renewal applications before us would serve the public interest, convenience, and necessity."[28] The FCC based this conclusion on the failure of the petitions to allege violations of any specific Commission standards or guidelines. The Commission noted that it had no requirement that stations develop demographic data related to the hearing impaired population of a service area, specifically ascertain the needs of the deaf, or utilize captioning or other techniques to make programming accessible to the hard of hearing.[29] The Commission also found that Section 504 of the Rehabilitation Act did not apply to the commercial licensees,[30] and it stated that the Department of Health, Education and Welfare (HEW) was the appropriate agency to consider whether the public station

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[26] *See* JA at 24-28.

[27] *Order, supra* note 4, 69 FCC2d at 451, JA 1.

[28] *Id.* at 459, JA 9.

[29] *Id.* at 458, JA 8.

[30] *Id.* at 459, JA 9.

had violated the Act.[31] Although it said that it would give consideration to any adverse finding that HEW might reach, the Commission denied that a petitioner could raise a "substantial or material" renewal question merely by alleging noncompliance with the Rehabilitation Act or with the national policy expressed by that statute.

The appellants[32] responded to the Commission's order by filing a petition for reconsideration, in which they alleged, in elaborated form, essentially the same arguments they had made earlier.[33] They also filed supplemental pleadings in which they presented evidence that viewers were not averse to captioned programming and claimed that the Commission was obligated by HEW regulations and by Executive Order to implement Section 504 of the Rehabilitation Act.[34] Once again, the Commission dismissed the petition as failing to present a

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[31] *Id.* Responsibility for issuance of guidelines applying § 504 to public television has since been shifted to the Department of Education. *See* note 22 *supra*. The FCC apparently now considers that Education is the agency responsible for determining statutory violations.

[32] The Commission originally determined that Mrs. Gottfried was the only signer of the petitions to deny who had established standing before the Commission. *See Order, supra* note 4, 69 FCC2d at 453, JA 3. But the standing of the Greater Los Angeles Council on Deafness, Inc. (GLAD) was at least implicitly recognized by the Commission in *Reconsideration, supra* note 4, 72 FCC2d 273, JA 11, even though the Commission declined to reverse its earlier standing determination. *See id.* at 280, JA 18. GLAD is before this court as an appellant, together with Sue Gottfried, individually and on behalf of the hearing impaired population within the stations' viewing area.

[33] *See Reconsideration, supra* note 4, 72 FCC2d at 276, JA 14.

[34] *Id.* at 275-276, JA 13-14.

substantial or material question of fact requiring further hearings.[35] Because the petitioners had not effectively challenged the stations' compliance with stated FCC requirements, the Commission held that they had not raised a substantial claim that the licensees' service had failed to satisfy the statutory requirement of being in the public interest.

Pursuant to Section 402 of the Communications Act, 47 U.S.C. § 402 (1976), Mrs. Gottfried appealed the decision of the Commission to this court.

II. Issues on Appeal

The issues presented in this appeal are complicated by the contested relationship between two statutes, the Communications Act and the Rehabilitation Act of 1973. The Rehabilitation Act does not directly impose any enforcement obligation on the FCC. But the Communications Act does require the FCC to make determinations about the requirements of the "public interest," and appellants argue that the "public interest" standard must be construed to require at least some consideration of the national policy expressed by the Rehabilitation Act and any legal obligations imposed on the stations by Section 504. We agree.

Because the parties have assumed that Section 504 of the Rehabilitation Act applies to public television stations,[36] we begin by considering the obligation of the FCC

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[35] *See id.* at 281, JA 19.

[36] In its brief in this court, *see* brief for appellee at 15-16 & n.9, the FCC states that it had determined to defer to the judgment of HEW on this question, and that "[i]n the case entitled *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California d/b/a KCET-TV, et al.*, Civil No. 78-4715-R (C.D. Cal.), HEW stated that it had determined that Section 504 is applicable to public

to weigh compliance with this standard in a challenge to renewal of a license such as that involved in this case. This discussion yields the conclusion that the case of the public station must be remanded to the Commission. We then consider the argument that Section 504 applies to the commercial stations, and conclude that it does not. Although the Commission may still be obliged to weigh the national policy of the Rehabilitation Act within the public interest standard, the commercial stations themselves have been assigned no direct statutory obligations to the hearing impaired. We therefore determine that the Commission has a range of discretion in assessing what commercial stations must do in the public interest, and in consideration of both its expertise and its efforts in the area, we defer to its judgment at this

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television stations that receive federal financial assistance." As an intervenor in this court KCET-TV does not expressly concede the applicability of § 504, noting that Congress went to some lengths to assure that programming funded by the Corporation for Public Broadcasting is insulated from federal control and regulation. *See* brief for intervenor Community Television of Southern California at 15 n.7. Significantly, however, KCET-TV does not deny that it is a recipient of federal funds channeled to it through the Corporation for Public Broadcasting. Moreover, although it was generally eager to keep public broadcasting free from "governmental interference or control," *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975), Congress not only did not intend to free public broadcasters from all legal standards, *see id.* at 294-296, but actually created some programming standards applicable to public broadcasters only, *see id.* at 291 & n.7. We therefore reject any implied argument that Congress could not have intended federal funds channeled through the Corporation for Public Broadcasting to count as federal financial assistance merely because such a construction would subject recipients to a statutory requirement of nondiscrimination against the handicapped.

The administrative agencies responsible for implementing the Rehabilitation Act have held consistently that § 504 applies to public television broadcasters. *See* note 22 *supra*.

time. We repeat, however, that in our view television, both public and commercial, should be made available to persons with impaired hearing now.

III. PUBLIC STATIONS

Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from * * * participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[37]

In this case appellants urge that public television station KCET-TV is a recipient of federal financial assistance subject to the statute. This claim rests on two bases. First, appellants argue that a broadcast license is itself a valuable commodity constituting "financial assistance" as that term is used under the Rehabilitation Act.[38] Second, appellants argue that KCET-TV, as a "public" or noncommercial educational broadcasting station, is subsidized by congressional appropriations channeled, among other sources, through the National Telecommunications and Information Administration of the Department of Commerce and the Corporation for Public Broadcasting.[39]

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[37] 29 U.S.C. § 794 (1976).

[38] This argument is based largely on the proposition that a license to broadcast on the public airwaves is a valuable commodity. *See* brief for appellants at 32-41. Although not explicitly disputing that broadcast licenses possess economic value, the FCC argues that Congress did not intend broadcast licenses to count as "Federal financial assistance" for purposes of applying the Rehabilitation Act. *See* brief for appellee at 15-30.

[39] Under the Educational Broadcasting Facilities Act, 76 STAT. 46 (1962), and the Public Broadcasting Act, 81 STAT. 365 (1967), 47 U.S.C. §§ 390-399 (1976 & Supp. III 1979), as

In its brief in this court the FCC does not dispute the applicability of Section 504 to public station KCET-TV. At the time it was the agency responsible for interpretation of the Rehabilitation Act—and thus at a time when its construction would have been due "substantial deference" from a reviewing court[40]—the Department of

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amended by the Public Telecommunications Financing Act, 92 STAT. 2405 (1978), public or noncommercial educational broadcasting stations, such as KCET-TV, are subsidized by federal appropriations dispensed through the National Telecommunications and Information Administration of the Department of Commerce and/or the Corporation for Public Broadcasting. The Corporation, a nonprofit organization created by federal statute, receives funds directly from the federal treasury, subject to a number of statutory directives and prohibitions concerning how the funds may be spent. *See* 47 U.S.C. § 396 (1976 & Supp. III 1979).

During its 1977 fiscal year, KCET-TV received $2,363,927 —more than 18% of its total revenues—from the Corporation for Public Broadcasting. *See* Private Defendants' Proposed Findings of Fact. Statements of Fact as to Which There Is No Genuine Issue, and Proposed Conclusions of Law (Sept. 28, 1979), *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.). In the same year the station also got $495,229 from the Public Broadcasting Service, which in turn is largely funded by the Corporation for Public Broadcasting. KCET-TV's revenues for 1977 also included $2,298,160 in restricted program grants provided directly by various agencies of the federal government. *See* note 44 *infra* and accompanying text.

[40] An administrative interpretation of a statute is due substantial weight from a reviewing court when it reflects "a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); *see E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Health, Education and Welfare determined that Section 504 applies to public broadcasting stations.[41] The Department of Education, which has now assumed responsibility for developing guidelines applicable to public broadcasters, has apparently accepted this conclusion,[42] and the FCC has indicated a willingness to defer to its judgment.[43]

The case of KCET-TV also exhibits incidences of more direct and traditional "Federal financial assistance." During 1977, the year in which KCET-TV's petition for license renewal was challenged, federal agencies combined to provide the station with $2,298,160—an amount representing roughly 17 percent of its revenues for the year—in restricted program grants.[44] The contributing agencies included the National Institute for Education, which granted $1,814,090; the National Endowment for the Arts, $461,872; the National Endowment for the Humanities, $18,243; and the United States Information Agency, $3,955. We therefore conclude that Section 504 imposed legal obligations on station KCET-TV during

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[41] HEW in fact began to develop compliance guidelines for public broadcasters in October 1979, but it had not completed the task prior to its split into separate Departments of Health and Human Services and of Education in May 1980.

[42] The Department of Education has recently issued a *Notice of Intent to Develop Regulations*. *See* note 22 *supra*.

[43] *See* brief for appellee at 15-16 n.9; *Order*, *supra* note 4, 69 FCC2d at 459, JA 9 ("[I]n the event some adverse finding were made relative to Section 504, the Commission would take whatever action would be appropriate.").

[44] *See* Private Defendants' Proposed Findings of Fact, Statements of Fact as to Which There Is No Genuine Issue, and Proposed Conclusions of Law (Sept. 28, 1979), *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.).

the term of its license preceding the renewal challenge, and we assume that it continues to do so.

There remain, however, important issues concerning the duty of the FCC to define the station's responsibilities under the Rehabilitation Act and to enforce the Act's policies in license renewal proceedings. The FCC is not the agency primarily responsible for enforcing the Rehabilitation Act. Nonetheless, appellants argue that the Act's Section 504 reflects a partial congressional definition of the FCC's obligation to serve "the public interest"—in effect, a specification that the FCC must consider compliance with Section 504's nondiscrimination requirement in determining whether a public broadcaster has satisfied the public interest standard.[45] Second, appellants argue that the FCC is bound to take immediate action to implement Section 504, at a minimum by bringing its policies to bear in renewal proceedings such as this.[46] The FCC, noting that no guidelines have yet been issued by the Department of Education, takes a different view. The Commission asserts that it would be unfair to penalize a station in a license renewal proceeding for noncompliance with a statute for which interpretive guidelines were not in existence during the term of the license.[47]

Under the special circumstances presented by this case, we agree with appellants that the FCC is obligated to take account of a public broadcaster's legal duties under Section 504 in making its public interest determinations. Moreover, given the variety of procedural options pursuant to which the FCC could avoid unfair harshness to the broadcaster, we cannot accept that the public television stations need to be regarded by the Commission

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[45] *See* brief for appellants at 47-50.

[46] *See id.* at 51-55.

[47] *Reconsideration, supra* note 4, 72 FCC2d at 279, JA 17.

as free from any enforceable obligations under Section 504 until interpretive guidelines are issued.

A. *Section 504 and the Public Interest Standard*

The FCC is directed to renew broadcast licenses only if it finds that renewal would serve the "public interest, convenience, and necessity." 47 U.S.C. § 309(a) (1976). In construing this standard we must of course accord substantial deference to the Commission's judgments. As the Supreme Court has recently observed, " 'the weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission in the first instance.' " *FCC v. WNCN Listeners Guild*, —— U.S. ——, ——, 49 U.S. L. WEEK 4306, 4310 (March 24, 1981), *quoting FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978). Yet there remains, under the Communications Act, an inescapable judicial role. Although the "public interest" standard requires judgments of policy, *see FCC v. WNCN Listeners Guild, supra*, —— U.S. at ——, 49 U.S. L. WEEK at 4310, it also contains an irreducible element of law, *see National Broadcasting Co. v. United States*, 319 U.S. 190, 224-226 (1943), which makes judicial review both necessary and possible. *Cf. NAACP v. FPC*, 425 U.S. 662, 669 (1976) ("[T]he words 'public interest' in a regulatory statute * * * take meaning from the purposes of the regulatory legislation."). It is the function of the judiciary to resolve disputed questions of law. *See Internat'l Brhd of Teamsters v. Daniel*, 439 U.S. 551, 566 & n.20 (1979).

In their brief in this court appellants argue that the FCC's "public interest" mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under Section 504 of the Rehabilitation Act of 1973. We agree.

We begin with the settled proposition that a federal agency, in construing the requirements of the "public interest" under its governing statute, must at least give weight to federal laws and public policies addressed to similar purposes. *See, e.g., McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944) (Interstate Commerce Commission obliged to weigh policies implicit in Sherman Act); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968) (Federal Power Commission, operating under public interest mandate, is "obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations"); *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956) (FPC obligation to consider antitrust factors not alleviated by fact that antitrust enforcement generally committed to Attorney General); *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949); *see also FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968) (antitrust laws are tool by which regulatory agency gives "understandable content to the broad statutory concept of the 'public interest'"); *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 222-224. It makes no difference in such cases that Congress may have vested primary responsibility for enforcement of a statutory policy in another agency. As the Supreme Court has made clear, the grant of enforcement power to one organ of government does not free others to ignore national laws and policies until such time as violations have been proved in the courts. *See, e.g., McLean Trucking Co. v. United States*, *supra*, 321 U.S. at 79-80; *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 222-224.

By its passage of the Rehabilitation Act of 1973 Congress placed public stations under a legal obligation to consider and attempt to serve the interests of the nation's hearing impaired minority. Surely the policy of

this statute falls well within the broad purposes of the Communications Act. As the Supreme Court has recognized, the "public interest" standard established by the Communications Act imposes on the FCC an affirmative "obligation * * * to ensure that its licensees' programming fairly reflects the tastes * * * of minority groups." *NAACP v. FPC, supra,* 425 U.S. at 670 n.7.

Following Congress' decision that recipients of federal assistance must extend their programs to otherwise qualified members of handicapped minorities, settled legal principles compel the conclusion that the FCC must, at a minimum, weigh this congressional policy in making "public interest" determinations. It is unreasonable to believe that a public station could give service cognizable as being "in the public interest" without at least making efforts to satisfy its statutory obligations.[48]

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[48] In *Accuracy in Media, Inc. v. FCC,* 521 F.2d 288 (D.C. Cir. 1975), this court held that the Commission lacks jurisdiction directly to enforce legal obligations imposed on the Corporation for Public Broadcasting by the Public Broadcasting Act of 1967, 81 STAT. 365 (1967), *as amended,* 47 U.S.C. §§ 390-399 (1976 & Supp. III 1979). Intervenor KCET-TV suggests that this holding rests on the principle that "the programming of noncommercial broadcast stations such as KCET is insulated from federal control and regulation," brief for intervenor Community Television of Southern California at 15 n.7, and that federal money channeled to noncommercial stations through the Corporation for Public Broadcasting should therefore not be construed as "Federal financial assistance" if such a construction would subject noncommercial broadcasters to federal legal controls. This claim rests on a confusion of arguments. *Accuracy in Media* held that the FCC could not directly, by order or otherwise, enforce the obligations imposed on the Corporation for Public Broadcasting by the Public Broadcasting Act. But the case did not hold that public stations were not recipients of federal financial assistance. It did not hold that they were not subject to legal obligations under other federal statutes. *See* 521 F.2d at 294-296. And, most important, it did not

In holding as we do, we do little more than recall the FCC to a position it has itself asserted in the past. The Commission has frequently recognized its obligation under the public interest standard to protect the interests of minority groups previously excluded from full access to broadcast programming. *See, e.g., Nat'l Organization for Women, NYC Chapter v. FCC*, 555 F.2d 1002, 1017 (D.C. Cir. 1977) (Commission considers "the employment practices of its licensees *to the extent those practices affect the obligation of the licensee to provide programming* that 'fairly reflects the tastes and viewpoints of minority groups' *and to the extent those practices raise questions about the character qualifications of the licensee*") (emphasis in original; footnotes omitted); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC2d 222

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hold that the FCC should not indirectly enforce legal obligations, arising under federal statutes other than the Public Broadcasting Act, in licensing proceedings under the public interest standard. *See id.* at 295-296 & n.33. On the contrary, the court was careful to note that "[w]e find nothing * * * which limits established FCC authority * * * over local noncommercial licensees," *id.* at 295, and that "FCC regulation of the educational licensees was seen as the ultimate check on the public broadcasting system," *id.* at 295-296 n.33.

In recognizing the FCC's continuing and undiminished authority to assess compliance with the public interest standard, the *Accuracy in Media* court noted that, under a provision of the Public Broadcasting Act, 47 U.S.C. § 398 (1970), current version 47 U.S.C. § 398 (Supp. III 1979), no agency of government is authorized to "exercise any direction, supervision, or control" over public telecommunications. *See* 521 F.2d at 292 (*quoting* statute). But the court clearly stated that the "prohibition against governmental interference is expressly limited to [attempts to enforce] authorizations" contained in the Public Broadcasting Act itself, *see* 521 F.2d at 296, and that the FCC's obligation to uphold the public interest arises from a section of the Communications Act, 47 U.S.C. § 309 (1976), to which the prohibition did not apply.

(1976); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 FCC2d 766 (1968). Although the Equal Employment Opportunity Commission was given primary responsibility for enforcement of the discrimination prohibitions of the 1964 Civil Rights Act, the FCC recognized its independent responsibility, pursuant to the public interest standard, to carry out the Act's policy. Its authority to do so has been recognized by the courts. *See, e.g., NAACP v. FPC, supra*, 425 U.S. at 670 n.7; *Nat'l Organization for Women, NYC Chapter v. FCC, supra*, 555 F.2d at 1015-1020. And where the Commission has lagged in accepting its responsibility, this court has not hesitated to direct it to do so. *See, e.g., Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (*per curiam*); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). We do not shirk our duty in the present case.

B. *Required Procedures*

In their brief in this court appellants have asked us to remand the license renewal application of public station KCET-TV for a public hearing and other appropriate proceedings by the FCC.[49] We regard this as the proper disposition.

The FCC has objected that KCET-TV complied with all existing Commission rules, and that there is thus

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[49] *See* brief for appellants at 51-53. The FCC understands appellants to argue that the Commission is obligated to impose specific requirements of program captioning on all of its licensees. *See* brief for appellee at 38-39. Even if we believed appellants to be urging such a claim, we would need to reject it at this time, as prematurely interfering with the Commission's discretion to determine what accommodations to the deaf can reasonably be required of licensees under the public interest standard. *See* text accompanying notes 51-52 *infra*.

"no substantial and material question of fact" to be determined before final action on the application.[50] But, as this court has held before, "Under Section 309(e) the Commission must set a renewal application for hearing where 'a substantial and material question of fact is presented *or* the Commission for any reason is unable to make the finding' that the public interest, convenience, and necessity will be served by the license renewal." *Office of Communication of United Church of Christ v. FCC, supra*, 359 F.2d at 1007 (emphasis in opinion of Burger, J.; citation omitted).

Finding that Congress must be understood to have prescribed that the "public interest" encompasses at least the legal interests of the nation's hearing impaired minority, we do not believe that a Commission decision in which this factor has not been weighed can escape condemnation as "arbitrary, capricious, [or] an abuse of discretion."[51] As the Supreme Court held in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1972), satisfaction of this standard requires, at a minimum, "consideration of all relevant factors."

The task of weighing the interests of the hearing impaired is not an easy one, and we do not presume to intrude into the Commission's range of discretion in this difficult area. It is appropriate, however, for us to respond to some of the concerns that the Commission has raised on this appeal.

These concerns arise primarily from the ambiguity of the legislative policy expressed in Section 504. In construing this provision the responsible administrative agencies have concluded that Congress intended recipients of federal funds to make "reasonable accommodations"

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[50] *Order, supra* note 4, 69 FCC2d at 459, JA 9; brief for appellee at 30-40.

[51] 5 U.S.C. § 706(2)(A) (1976).

to provide service to handicapped persons, *see* 45 C.F.R. § 84.12 (1977) (HEW guidelines), current version 34 C.F.R. § 104.12 (1980) (Department of Education guidelines), and the courts have generally accepted this construction, *see, e.g., United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977) (cause remanded to District Court for application of guidelines); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977) (same). But, as the Supreme Court acknowledged in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), the line between lawful refusal to extend affirmative action and illegal discrimination will not always be clear.

Emphasizing the difficulty of line-drawing in this area, the Commission pleads that it has no choice but to stay its hand. The Department of Education is currently engaged in preparation of interpretive guidelines construing the obligations that Section 504 imposes on public broadcasters.[82] Pending completion of those guidelines the FCC has said that it has no basis for assessing compliance with the statute, and that there would be nothing for it to consider in the public hearing requested by appellants. We do not agree.

In pursuing the public policy represented by Section 504 it is not the function of the FCC to adjudicate law violations, or, indeed, to regard itself as bound strictly by the specific dictates of the Rehabilitation Act or interpretive guidelines issued thereunder. *See, e.g., California v. FPC*, 369 U.S. 482, 490 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 350 (1959). The Commission's responsibility is rather to effectuate the underlying national policy of providing federally assisted programs, including public television, to handi-

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[82] It remains unclear, however, when the guidelines will be completed. *See* note 22 *supra*.

capped persons, such as the deaf, who are capable of benefitting from them.

In effectuating a policy that is currently framed in general terms only, the FCC must of course proceed with sensitivity to the situation of its licensees. In its review of KCET-TV's renewal application the Commission can appropriately consider the station's uncertainty about the precise requirements imposed on it by Section 504. It would indeed be unfair to insist on strict compliance with a standard developed after the fact, and we expect the FCC neither to develop nor to apply a fully formulated set of guidelines at this time. Nonetheless, it is clear to us that the absence of interpretive guidelines—either now or during the station's license term—could not justify a licensee's disregard of or indifference to the policies of the statute. Eight years after the passage of the Rehabilitation Act, we cannot accept that a public station still has no duty to make reasonable efforts to serve the handicapped, or that this duty cannot be enforced, in an agency proceeding, by an intended beneficiary of the statute. The Commission must therefore proceed immediately to inquire at least into the station's good faith, as manifest in its efforts to provide service in accord with the legislative policy goals of Section 504.

The Commission has also argued that it would be unfair for the issues at the heart of this case to be raised for the first time in a license renewal proceeding.[58] During the term of its license KCET-TV lacked clear standards defining the level of service required by Section 504. And in the absence of prior notice of the FCC's renewal policy, the Commission argues, it would be wrong to penalize a station for its shortcomings.

Our answer to this argument is implicit in what we have said before. Properly conducted, an FCC inquiry

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[58] *See* brief for appellee at 38-39.

will impose no unreasonable burden on the station. Focusing primarily on good faith efforts to interpret and follow statutory policies, it should not enforce numerical criteria on a retroactive basis, but instead assess the station's willingness—as measured against its capacity and its viewers' need—to provide programming for the aurally handicapped.

As the Commission itself has asserted repeatedly, the predominant concern in a license renewal case may be "prospective, seeking to lead a licensee who has not possessed an adequate * * * program in the past to adopt policies ensuring" better performance in the future. *Nat'l Organization for Women, NYC Chapter v. FCC*, *supra*, 555 F.2d at 1017, *quoting Nat'l Broadcasting Co.*, 58 FCC2d 419, 422 (1976); *see Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC*, *supra*, 595 F.2d at 628 & n.24. Consistent with that concern, in a case such as this the FCC may choose among a variety of dispositional alternatives, including short-term or conditional license renewal, as well as standard renewal or denial. We intimate—because we hold—no *a priori* preference among them. The ultimate decision is obviously not for us, but for the Commission,[84] with its special ex-

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[84] Appellants seem at some points in their brief to suggest that there can be no discretion in this matter, because the First Amendment protects the right of all segments of society to have access to programming over the public airwaves. *See* brief for appellants at 55-57. From this premise they appear to deduce a right to have broadcast programming captioned for the hearing impaired. Even if the First Amendment entitles the hearing impaired to have access to some minimum of programming over the airwaves, however, we could not accept that it requires all stations to make their programming accessible to all deaf persons all of the time. *Cf. Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 96 (1973) (frequency scarcity makes it infeasible for all persons wishing to speak to have access to the air). In demanding fair access to the public airwaves for the hearing impaired, the First Amendment, in

pertise concerning what can reasonably be expected of a public broadcaster within the context of current technology and current needs.

We recognize the indefiniteness with which our prescriptions are stated. The guidelines promised by the Department of Education will hopefully resolve many of the uncertainties confronting the stations, the Commission, and this court. But we reiterate our strong view that no guidelines are needed to identify the outlines of Congress' policy aims. The Commission—like the stations—must accept its duty now. There are many ways in which the policy of Section 504 of the Rehabilitation Act might be implemented. We hold only that it cannot be ignored.

IV. Commercial Stations

A. *Section 504 and Federal Licenses*

Appellants argue that the seven commercial stations involved in this case are also bound by Section 504 of the

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our view, sweeps no more broadly than the public interest standard of the Communications Act, under which we are unprepared to demand a specific, substantive interpretation from the Commission at this time.

Intervenors in this court have also lodged a First Amendment argument on behalf of the licensees: the argument that any captioning requirement the FCC might impose would violate protected rights of the broadcasters by regulating the "content" of their programming. *See* joint brief for intervenors American Broadcasting Companies, Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Co.; and RKO General. Inc. at 47-51. We find this argument to be without merit. A captioning requirement would not significantly interfere with program content. And in cases of more limited regulations such as those likely to come in issue it is well established that the Commission may constitutionally condition licenses on a station's provision of programming in the public interest. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-392 (1969); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 226-227 (1943).

Rehabilitation Act, and that the FCC must therefore assess their compliance with the statute in considering applications for license renewal. We are unable to accept this argument in the terms advanced by appellants.

Section 504 directly imposes legal obligations only on recipients of "Federal financial assistance." Appellants correctly argue that a license to broadcast on the public airwaves is a commodity of great value.[55] But this does not resolve the question of congressional intent: Did Congress intend broadcast licenses to count as "financial assistance" within the meaning of Section 504? We are unable to conclude that it did.

The first reason arises from the statute's legislative heritage. Section 504 of the Rehabilitation Act was expressly modeled on Section 601 of Title VI of the Civil Rights Act of 1964.[56] And although the legislative his-

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[55] Appellants cite an article, Levin, *Economic Effects of Broadcast Licensing*, 72 J. POL. ECON. 151 (1964), in which it was estimated, as long ago as 1964, that the average value of a VHF license exceeded $1,500,000. *See* brief for appellants at 33-34. That figure was based on calculations of the difference between the sale price of stations actually sold and the replacement cost of the stations' material facilities. Whatever the actual figure, there can be no doubt that the broadcast licenses contested in this case possess great value. In the Los Angeles market, which comprises approximately 10 million people, the FCC grants only 13 commercial licenses to television broadcasters. And Los Angeles is the most profitable market in the country. *Broadcasting Magazine*, July 30, 1979, at 46-47. *Cf. Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (broadcast license constitutes "valuable privilege"); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, *supra* note 54, 412 U.S. at 174 n.5 (Brennan, J., dissenting) (free license is functional equivalent to "Government subsidization of broadcasters").

[56] *See* S. Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted at* [1974] U.S. Code Cong. & Ad. News 6373, 6390 ("Section 504 was patterned after, and is almost identical to, the anti-

tory of Section 504 is sparse, we find ample evidence to conclude that Congress did not intend Title VI to reach the recipients of licenses from the FCC. This evidence includes congressional hearings and floor debates, in which various speakers interpreted the language as applying to "funds" [57] and "public moneys out of the Federal Treasury," [58] and none apparently referred to federal licenses.[59] It also encompasses authoritative inter-

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discrimination language of section 601 of the Civil Rights Act of 1964"); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280 & n.9 (7th Cir. 1977); 119 Cong. Rec. S6144-S6145 (daily ed. March 1, 1973) (remarks of Sen. Humphrey, indicating that § 504 represented substitute for amendments to Title VI to protect the handicapped). Congress reiterated its intent in 1978 when it adopted the Rehabilitation, Comprehensive Services and Development Disabilities Amendments, Pub. L. No. 95-602. Section 120 of the Amendments, § 505(a)(2) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(2) (Supp. III 1979), points explicitly to Title VI as a model for § 504:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this [Act].

[57] *See, e.g., Civil Rights: Hearings before the House Judiciary Committee*, 88th Cong., 1st Sess. 2731 (1963) (statement of Attorney General Robert F. Kennedy) ("It is going to be every program of the Federal government where Federal funds are expended.").

[58] *See, e.g.*, 110 Cong. Rec. S6430 (daily ed. March 26, 1964) (transcript of televised remarks of Sen. Humphrey) ("What it merely says is that public moneys out of the Federal Treasury will not be used to promote discrimination * * *.").

[59] Not even opponents of the 1964 Civil Rights Act, who frequently criticized the measure on account of what they considered its excessively broad sweep, *see, e.g., Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, reprinted at* [1964]

pretations of the Civil Rights Act developed by the Attorney General both before and after the measure's passage. In anticipation of the congressional debate Congressman Celler asked the Justice Department to supply a list of federal programs and activities that would fall within the ambit of Title VI.[60] Duly prepared by the Deputy Attorney General, the list that appeared in the Congressional Record of June 10, 1964 included no reference to the FCC or to any other government program involving issuance of federal licenses.[61]

The Justice Department reiterated its interpretation after the Civil Rights Act had become law. Designated to develop interpreting regulations, the Department undertook to aid all affected agencies to formulate standards to implement Title VI. Yet it found no need for the issuance of regulations by the FCC.[62] The Justice Department's contemporaneous construction of the statutory term "Federal financial assistance" deserves substantial weight in this court, both because of the Department's close involvement in the drafting of the Civil Rights Act and because of its status as the agency responsible

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U.S. Code Cong. & Ad. News 2341, 2433 (bill "constitutes the greatest grasp for executive power conceived in the 20th century"), suggested that issuance of a federal license would subject licensees to Title VI. For example, Congressmen Poff and Cramer, who filed separate minority views, listed existing federal programs that "apparently would be embraced." *See Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer, reprinted at* [1964] U.S. Code Cong. & Ad. News 2471, 2471-2472. None of the programs contained on their list involved federal licensing. *See id.*

[60] *See* 110 Cong. Rec. H13380 (daily ed. June 10, 1964).

[61] *See id.* at H13380-H13382.

[62] The Justice Department remains responsible for coordination and implementation of Title VI, *see* Executive Order 11764 (Jan. 24, 1974), 3A C.F.R. 124, and it has at no time issued, or asked the FCC to issue, regulations governing recipients of broadcast licenses.

for "setting the [Act's] machinery in motion." *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977).

The agencies responsible for implementation of the Rehabilitation Act have followed the pattern of construction established under the Civil Rights Act. They too have regarded broadcast and other licenses as falling outside the statutory meaning of the term "Federal financial assistance." Neither HEW nor the Department of Education has thought it necessary to issue regulations applicable to commercial broadcasters.[43] And regulations

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[43] HEW was charged by Executive Order 11914, 41 FED. REG., 17871 (April 28, 1976), with the task of issuing general regulations for the guidance of all federal agencies providing financial assistance encompassed by § 504. It developed an expansive definition of financial assistance:

> (h) "Federal financial assistance" means any grant, loan, contract * * *, or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:
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> (1) Funds;
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> (2) Services of Federal personnel; or
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> (3) Real and personal property or any interest in or use of such property, including:
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> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
>
> (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

45 C.F.R. §§ 84.3(h) & 85.3(e) (1979). Relying on the breadth of the HEW definition, appellants cite that agency's interpretation in support of their position. *See* brief for appellants at 28-31. Significantly, however, HEW never explicitly classified broadcast licenses as financial assistance, nor did that agency ever issue regulations specifically applicable to commercial broadcast licensees or ask the FCC to do so. The Department of Education, which has now assumed responsibility for issuing interpretive guidelines applicable

issued by the Justice Department, which has recently been designated by Executive Order as the agency responsible for coordinating federal efforts to implement the Rehabilitation Act,[64] hold specifically that federal licensees are not bound by Section 504.[65] We note also that the Justice Department's interpretation accords with the FCC's construction of the Communications Act of 1934, under which licenses are not regarded as establishing property rights,[66] even though licensees do enjoy a limited renewal expectancy.[67]

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to public broadcasters, has given no indication that it regards § 504 as applying to commercial licensees.

[64] *See* Executive Order 12250, 45 FED. REG. 72995 (Nov. 4, 1980).

[65] *See Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914*, 45 FED. REG. 37620, 37632 (June 3, 1980) ("The term 'Federal financial assistance' * * * does not include licenses, for example, since licenses are not Federal assistance grants, contracts, loans, or cooperative agreements."). The Justice Department guidelines were intended to apply only to federally funded programs administered by the Department of Justice. Since their issuance, however, the Department has been designated as the agency primarily responsible for coordinating and implementing federal compliance with § 504. *See* Executive Order 12250, 45 FED. REG. 72995 (Nov. 4, 1980).

[66] *See Reconsideration, supra* note 4, 72 FCC2d at 277, JA 15. The Commission bases its construction on the plain language of the Act, which states expressly that "no [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (1976). The Supreme Court has also held that Congress intended the Commission's grant of a license to create no property rights. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331-332 (1945); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

[67] *See, e.g., FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 805 (1978); *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 61 (D.C. Cir. 1978) (*per curiam*) (petition for rehearing).

B. *Public Interest Obligations*

In denying appellants' claim that the FCC committed reversible error in failing to hold the seven commercial stations to specific obligations under Section 504, we are not unmindful that the FCC functions under a statutory obligation to make findings about the public interest, and that the Rehabilitation Act of 1973 may evidence a general national policy of considering the concerns of the deaf within the public interest rubric,[68] even where direct legal obligations are not imposed. Indeed, the FCC itself has sometimes suggested that it could not, consis-

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[68] *Cf.* text and notes at notes 48-52 *supra; Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices,* 13 FCC2d 766, 769 (1968):

> There is [a] National policy against discrimination in hiring. And here we note that this is a National policy. The 25-employee prescription in the Civil Rights Act does not limit that National policy, and specifically, "title VII was not intended to circumscribe the authority of Federal agencies other than the Equal Employment Opportunity Commission to regulate employment practices." (See letter of Assistant Attorney General Pollak, app. A, pp. 2-3.) Second, there is the consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together—the National policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National policy. In this respect—a mass media service to the public which is based entirely on a Federal license under a public interest standard—the situation clearly parallels the Federal policy in contract awards. * * *

tent with its statutory mandate, ignore the wants and needs of minorities that national policies aim to protect.[69]

Because of the national policy of extending increased opportunities to the hearing impaired, we believe that some accommodations for the hard of hearing are required of commercial stations, under the general obligation of licensees to serve "the public interest, convenience, and necessity." But in the absence of specific statutory obligations directed at the commercial broadcasters,[70] we conclude that it would not be appropriate for us to delineate standards for the commercial stations or to require specific Commission procedures at this time.

In its brief in this court the Commission rehearses a series of efforts that it has encouraged and licensed from 1970 to the present.[71] It represents that it is moving

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[69] *See The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC2d 917, 919 (1970) (expressing concern about needs of hearing impaired and noting that if stations do not voluntarily provide better service "it may be necessary to begin rule making looking toward the adoption of minimum requirements"); *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC2d 766, 769 (1968) (*quoted in* note 68 *supra*).

[70] In its *Notice of Intent to Develop Regulations*, *see* note 22 *supra*, the Department of Education seems to hold open the possibility that at least some commercial stations may air programs that are produced with federal assistance, and that they may therefore be subject to statutory obligations under § 504 of the Rehabilitation Act. *See* 46 FED. REG. 4954, 4955 (Jan. 19, 1981). Because receipt of assistance of this kind has not been alleged as a basis for the existence of statutory obligations in this case, no such issue is before us. We hold only that broadcast licenses do not by themselves constitute "Federal financial assistance" within the meaning of § 504.

[71] Brief for appellee at 3-6. Some of the Commission's efforts are described at notes 12-19 *supra* and accompanying text.

forward in this area, and that it will continue to do so.[72] Recognizing that the Commission possesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace,[73] we defer today to its judg-

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[72] The Commission has expressed especially high hopes for the closed captioning program initiated in March 1980, pursuant to which PBS, NBC, and ABC are making available approximately 20 hours of "closed captioned" programming per week. *See Reconsideration, supra* note 4, 72 FCC2d at 281, JA 19:

> [W]e are satisfied that important advances are being made toward achieving the goals which petitioners espouse and which we share—namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success. However, if at a later date it is demonstrated that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if a rulemaking is warranted to ensure that the hearing impaired are not deprived of the benefits of television.

(Footnote omitted.) The Commission made similar representations in oral argument before this court.

[73] In the analogous case of establishing compliance guidelines for public stations under § 504, the Department of Education has asserted that at least the following factors must be taken into account: (1) costs of making broadcasting available to the hearing impaired; (2) alternative ways of distributing any costs incurred; (3) possible standards other than a requirement that all programming should be accessible to the hearing impaired; (4) attitudes of the general public toward open captioning and cameo signing; (5) the state of existing technology. *See* "Declaration of Cynthia G. Brown, Assistant Secretary for Civil Rights, Department of Education," accompanying Defendants' Motion to Modify Order of March 20, 1980, *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.).

ment. However, should the Commission fail to fulfill its obligations to the nation's hearing impaired minority, as we have indicated above,[74] judicial action might become appropriate at a later date.

In consideration of the Commission's representations of good faith and active concern, together with the record on which it based its decisions to renew the licenses of the seven commercial stations, we conclude that the action of the Commission with respect to the commercial broadcasters should be affirmed.

V. Conclusion

For the reasons stated in this opinion, those portions of the Commission's order denying appellants' application to deny license renewal to public station KCET-TV are vacated and remanded to the Commission for further proceedings, and those portions of the order that concern the seven commercial stations are affirmed.

So ordered.

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[74] *See* discussion at pp. 4, 14-15, 34-35 *supra*.

McGOWAN, *Chief Judge, concurring in part and dissenting in part*: Petitions to deny renewal of license were filed in this case with respect to seven commercial television stations, and one non-commercial public educational licensee, in the Los Angeles area. The opinion for the court affirms the FCC's action in disallowing such petitions—and renewing the licenses for the maximum permissible term—in the case of the seven commercial licensees. I concur in that result, but in doing so I cannot be unaware of the vastly different burden imposed on the educational station by reason of the court's remand for hearing of the petition to deny directed to the renewal of its license.

The licensing period in question, by reference to which renewals were sought, is the same for each of the eight stations, namely, 1974 to 1977. The differing treatment by this court of the petitions to deny renewal beyond that period results because of the court's holding that the non-commercial station, KCET-TV, is receiving financial assistance from the federal government within the meaning of § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357, *as amended*, 29 U.S.C. § 794 (1976), whereas the seven commercial stations are not. Although the court expressly states that, by reason of the "public interest" standard contained in the Federal Communications Act, it does not regard the latter stations as home free from licensee renewal challenges in the future from representatives of the hearing-impaired, it expressly notes that rulemaking, as distinct from license renewal proceedings, "might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing."

I agree, but I would not, in disposing of this case, limit that principle to commercial stations. It also com-

ports with the steps that have been taken to implement § 504 of the Rehabilitation Act. The Executive Branch of the Government, generally charged by the Constitution with enforcement of laws enacted by Congress, in 1976 assigned the responsibility for developing compliance standards for § 504 to the Department of Health, Education, and Welfare. The Department at length concluded that § 504 was applicable to non-commercial broadcast licensees, and it directed that its Office of Civil Rights develop compliance standards for such licensees. Under the Department of Education Reorganization Act, Pub. L. No. 96-88, 93 Stat. 691 (1979), the newly-created Department of Education took over that responsibility; and the HEW study group involved in preparing compliance guidelines for public TV licensees was transferred to it.

On January 19, 1981, the Department of Education issued a Notice of Intent to Develop Regulations relating to the rights of access of the hearing-impaired to television programs, 46 Fed. Reg. 4954, inviting comments by March 5, 1981.[1] The Federal Communications Commission represents that, when such guidelines become available, it stands ready to take them fully into account

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[1] In addition to seeking denial of license renewal by the FCC, appellants have been simultaneously pursuing a suit in the United States District Court for the Central District of California seeking (1) to enjoin KCET-TV from broadcasting any program that is not open-captioned and (2) to cut off the distribution of federal funds to KCET-TV. Civil No. CV-78-4715-R (C.D. Cal.). The District Court after trial, on March 20, 1980 ordered the Department of Education to issue final regulations not later than November 17, 1980. The District Court on November 24, 1980 modified its order so as to enlarge the time until February 17, 1981. The Court of Appeals for the Ninth Circuit, on December 19, 1980, stayed the order as modified pending appeal. It also directed the appeal to be expedited, and calendared for hearing as soon as practicable after the appellee's brief is filed.

in subsequent license renewal proceedings. And obviously the relevance of such guidelines in defining "the public interest" in the case of commercial license renewals will be very great indeed, even if they should be confined in terms to non-commercial stations.

Pending the issuance of such guidelines, I do not see why the benefits of their prospective operation should not extend to all licensees seeking renewal, commercial and non-commercial alike. Although it may be true, as we hold today, that the "financial assistance" from the Federal Government contemplated by the Congress in the Rehabilitation Act does not comprehend the existing free use of the publicly-owned airwaves by all licensees, form is favored over substance when commercial stations are, for this reason, spared the expense and uncertainty of renewal hearings, and a non-commercial station is not. Neither, on the record before us, had advance notice during their expired license terms of what was, and therefore could reasonably be, expected of them with respect to the wholly laudable, but technically complex, objective of providing access for the hearing-impaired.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re
License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California

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MEMORANDUM OPINION AND ORDER

(Adopted: August 8, 1978; Released: September 8, 1978)

BY THE COMMISSION: COMMISSIONER WASHBURN ABSENT.

1. The Commission has before it for consideration individual petitions to deny the 1977 renewal applications of eight television stations licensed to Los Angeles, California,[1] filed by Sue Gottfried individually and on behalf of the deaf and hearing impaired population within the stations' service areas as well as other organizations and individuals.[2]

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[1] *See* Greene County Planning Bd. *v.* FPC, 559 F.2d 1227, 1237 (2d Cir. 1977) *(En banc)*, *cert. denied*, 434 U.S. 1086, 98 S. Ct. 1280 (1978) *reaffirming* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

[2] The petitions set forth that Ms. Gottfried is joined by the Greater Los Angeles Council on Deafness, Inc. (GLAD) and its component organization; California Association of the Deaf, Long Beach Chapter; California Association of the Deaf, Riverside Chapter; California Association of the Deaf, San Fernando Valley Chapter; California State University, Northridge; CSUN Jewish Outreach; Children's Hear-More Institute; D.E.A.F. Media, Inc., Southern California Branch; Ear Research Institute; East Los Angeles College, Special Education; El Camino College, Special Education; Ephpheta Society of the Deaf; First Baptist Church of Van Nuys; Golden West College, Hearing Impaired Program; Greater Los Angeles Deaf Women's Bowling Association; Hebrew Association of the Deaf; John Tracy Clinic; La Fiesta Club of the

2. Except for some additional allegations made specifically against Station KCET-TV, the petitions are identical.[3] As basis for the renewal challenges, it is contended that the licensees' ascertainment efforts were defective especially as to the deaf and hearing impaired community, their past programming did not meet the needs of the deaf population, and the stations violated federal law — i.e., Section 504 of the Rehabilitation Act of 1973 — in not offering programming understandable to the aurally handicapped.

3. The licensees, in opposition, urge that the pleadings directed against their renewals be dismissed because of their failure to comply with the applicable statutory requirements so as to qualify as petitions to deny. They contend that the pleadings do not contain specific allegations of fact to demonstrate that petitioners are parties in interest or that a

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Deaf; La Puente Valley Vocational Center; Little Company of Mary Hospital, Audiology Center; Long Beach Club of the Deaf; Los Angeles City Schools, Special Education Division; Mental Health Program for the Deaf, Saint John's Hospital; Metropolitan Cooperative Library System; Newcastle School, Hearing Impaired Parent Group; Pasadena City College; Photo-Schools Films, Inc.; Pilgrim Lutheran Church of the Deaf; Pilgrim Tower; San Gabriel Valley Club of the Deaf; Santa Ana Guild for the Deaf; Selaco-Downey High School; Southern California Registry of Interpreters for the Deaf; Southern California Ski Club for the Deaf; Southern California Women's Club of the Deaf; Southwest Oral Deaf Adults; Temple Beth Solomon of the Deaf; and Valley Seniors Club of the Deaf; and several hundred area residents who signed petitions against each of the licensees which were consolidated into the applicable petition. These "petitions" were actually phrased as informal objections and included basically the same ascertainment and programming allegations made in the Gottfried pleading. Subsequent to the filing of the petitions, other copies of the same objection were submitted with additional residents' signatures.

[3] Other than the KCET-TV petition, the pleadings against the licensees vary only as to the number of appendicies and the number of signatures thereon.

grant of the renewal applications would not be in the public interest. The licensees further assert that the several hundred individual signers did not supply requisite affidavits nor did GLAD or any of its listed component organizations. Also, according to exhibits supplied by several licensees, some of the component organizations formally disavowed any association with the petition.[4] While acknowledging that Ms. Gottfried submitted an affidavit in support of the petition, it is contended that she failed to establish herself as a party in interest by either representing that she is a resident of the community or a listener or viewer of the stations involved. Finally, licensees contend that Gottfried has not alleged in her affidavit that she has personal knowledge of the facts set forth in the pleadings.

4. In response to the oppositions, Gottfried submitted another affidavit wherein she set out her residence as being within the service area of the challenged facilities and points out that because of her deafness she is unable to hear or understand television. Additionally, the reply contained an affidavit from Marcella M. Meyer, GLAD's Executive Director, which stated that she is "personally familiar with all of the organizations listed in the Petition, and each of them is directly interested in the problems of the deaf and hearing impaired." However, her affidavit does not support Gottfried's contention that the forty component organizations of the GLAD umbrella formally back the petition and should be considered petitioners. Moreover, it does not even serve to establish GLAD as a petitioner or informal objector.[5]

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[4] The John Tracy Clinic, Pasadena City College, and California State University, Northridge, formally notified the licensees that their institutions had not authorized participation in the renewal challenges.

[5] The only indication we have that GLAD wanted to participate in a challenge of the eight licensees came in an October 14, 1977, letter to the Commission from the president of GLAD, Leonard J. Meyer. Therein he stated that the umbrella organization "has

5. The requirements for petitions to deny as mandated by Section 309(d)(1) of the Communications Act of 1934, as amended, are that the petitioner must set forth specific allegations of fact to show that they are parties in interest and that a grant of the renewal application would not be in the public interest. Such allegations must be supported by affidavit of a person or persons with personal knowledge of such facts.

6. What we have before us is one timely-filed affidavit which does not establish standing and one late-filed affidavit that would serve to satisfy the defects of the initial one. Although the licensees have characterized these pleadings as "blanket" petitions, we believe that a good-faith effort has been made by Gottfried to comply with our procedural rules and, therefore, we will accept the second affidavit *nunc pro tunc*. See *Meyer Broadcasting Co.*, 20 FCC 2d 532 (1969). However, Ms. Gottfried is the only party who qualifies as a petitioner. Those members of the public who signed the numerous petitions that were filed with the Gottfried pleadings and subsequent thereto will be considered as informal objectors pursuant to Section 1.587 of the Commission's Rules and Regulations. Because of the uncertainty of GLAD's intentions in this matter, we will not consider it or its component organizations as participating herein.

7. As noted above, while filed individually against each of the eight licensees, the separate pleadings before us are virtually identical. The licensees urge that the "blanket" nature of the petitions fails to supply a sufficient degree of specificity to warrant any Commission consideration. We must agree with the licensees as to most of the allegations and they will be summarily disposed of below. On the other hand, we feel that certain of the allegations, in light of our often stated concern for the deaf and hearing impaired's involvement in television, should be explored herein.

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authorized Mr. Abraham Gottfried to represent us in filing an objection to the renewal of licenses" of the Los Angeles Television stations. Mr. Gottfried is the husband of Sue Gottfried and the attorney who assisted in the filing of the petitions.

The FCC and the Hearing Impaired

8. Before discussing the merits of the challenges, we believe that a brief background discussion of the Commission's actions regarding television licensees and the nation's hearing impaired would be helpful.

9. In 1970, the Commission issued a Public Notice that was distributed to all television licensees advising them of the special needs of the hearing impaired regarding information concerning emergency situations as well as news, information, and entertainment programming. *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC 2d 917 (1970). Pointing out that radio provided an important service to the visually handicapped, the Commission noted how well suited television is to provide a similar service to the deaf and hearing impaired. Accordingly, it was suggested that television stations could make use of visual as well as oral announcements of emergencies, utilize the fact of newscasters wherever possible so as to permit lip reading, and feature visualization of materials in news, weather, and sports programs. The Commission hoped that the notice would alert licensees to our concern for the needs of the hearing impaired citizen and make television a truly valuable medium for that segment of the population — estimated by the Department of Health, Education, and Welfare to include 13.4 million persons. We observed, however, that "it may be necessary to begin rule making looking toward the adoption of minimum requirements."

10. In 1972, the Commission granted authority to the Public Broadcasting Service (PBS) to begin experimentations in "closed" captioning utilizing the vertical blanking space of Line 21 of the television broadcast signal. Through the use of an encoder at the transmitting end and a decoder at the receiving end, this closed captioning system could supply visual information — captioning — of the aural portion of the television program to those hearing impaired persons whose television sets were equipped to receive the captioned

information while the rest of the viewing public would receive the normal visual and aural transmission. This differs from "open" captioning utilized, for example, by PBS in its rebroadcast of the *ABC Evening News*. Open captioning is transmitted to all viewers who see a printed display of the text of the aural transission at the bottom of the visual transmission.

11. Other than the PBS experiment, progress in providing a more viable information medium for the hearing impaired was disappointing. As a result of their experiment, PBS filed a Petition for Rulemaking (RM-2616) requesting an amendment of Subpart E of Part 73 of the Commission's Rules and Regulations to provide that Line 21, Field 1, and the available half of Line 21, Field 2, of the television vertical blanking interval be reserved for the transmission of captioned information for the deaf. Prior to the adoption of a report and order in that proceeding — Docket 20693 — we adopted Section 73.675 of our rules which requires television licensees to broadcast emergency information both aurally and visually or only visually. *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 FCC 2d 18 (1976), *recon. granted*, 62 FCC 2d 565 (1977).

12. In concluding Docket 20693 in 1976, the Commission determined that there were too many unanswered questions — technical and financial — and that at least for the present the proper approach in the matter was to not reserve Line 21 for the exclusive use of closed captioning of information for the deaf but to permit such captioning. *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, 63 FCC 2d 378 (1976). Further, the Commission expressed the belief "that licensees can and will be responsive to the needs of its viewers, but it is still the responsibility of each licensee to determine how it can most effectively meet those needs." Thus, there is no requirement that any television licensee —

commercial or non-commercial — provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information.

Ascertainment

13. Generally, petitioner asserts that none of the licensees followed Commission requirements to conduct continuous ascertainments of the community's problems, needs, and interests nor did any of the licensees utilize principals or management level employees at least 50% of the time in conducting the community leaders survey. However, no support is offered and, in view of the general nature of the allegations, we need not consider them further. Similarly, we note that despite Ms. Gottfried's contention to the contrary, there is no requirement in *Ascertainment of Community Problems by Broadcast Applicants (Renewal Primer)*, 57 FCC 2d 418 (1976), *Ascertainment of Community Problems by Noncommercial Broadcast Applicants, Permittees, and Licenses (Noncommercial Primer)*, 58 FCC 2d 526 (1976), or elsewhere that demographic data relating to an area's hearing impaired population need be included in a renewal application with a station's ascertainment information.[6]

14. Additionally, it is urged that each of the stations failed to evidence a general public survey but, if any were completed, they did not include the hearing impaired. Licensees are only required to place the results of the com-

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[6] Previously, under the *Primer on Ascertainment of Community Problems by Broadcast Applicants (Primer)*, 27 FCC 2d 650 (1971), commercial licensees were required to compile and submit a compositional survey of their community. In its place, the *Renewal Primer* requires only the maintenance in the public file of a listing of the demographic aspects including total population figures and numbers and proportions of males, females, minorities, youth, and the elderly. Similarly, noncommercial television stations under the *Noncommercial Primer* are only required to place such demographics in their public file.

pleted public survey in the station's public inspection file and certify that fact on the renewal application. We have no indication that this procedure was not followed. Furthermore, public surveys are to reflect randomness. While totally telephonic public ascertainments might well miss the deaf and hearing impaired, a survey employing such random sample techniques would satisfy our ascertainment requirements.

15. More specifically, Gottfried contends that none of the challenged licensees interviewed community leaders who represent the interests of the deaf and hearing impaired and, thus, the needs of that segment of the population have not been ascertained.

16. It is through the process of ascertaining community leaders that a broadcast licensee arrives at the problems, needs, and interests of its community. The Community Leader Checklist formulated by the Commission in the *Renewal Primer* and *Noncommercial Primer* and filed at renewal by each nonexempt licensee contains 19 specifically identified community elements or institutions as well as one "other" category. It is by continually ascertaining leaders of the elements so set forth in the checklist that a licensee meets the requirement that its ascertainment efforts constitute a representative cross-section of those who speak for the interests of the area served by the station. Neither the deaf and hearing impaired nor the physically handicapped in general constitute a separate checklist category. The licensee has the option, however, to include under the "other" category leaders in elements not found on the checklist that it determines to be significant. We should emphasize that recently the Commission addressed the petitioner's concern — one shared by other groups — that despite their significance in the community they are excluded from ascertainment because they are not set out as one of the 19 elements. Thus, in adopting the notice of proposed rule making in *Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, Docket No. 78-237, FCC 78-583, released August 8,

1978, we are proposing that licensees be obligated to seek out "other" accessible groups in the community that do not appear on the checklist. Therefore, in this instance, failure to include representatives from the aurally handicapped segment of society would not, in and of itself, discredit an ascertainment. Importantly, however, the licensees herein ascertained leaders from the health, welfare, and elderly elements of the community. Further, most of the licensees in their oppositions noted that these elements included leaders who are involved with the whole range of concerns of the physically handicapped which includes the deaf and hearing impaired. Moreover, several of the licensees ascertained representatives from GLAD and other groups identified by Gottfried as constituting persons aware of the problems of the aurally handicapped.[7]

Programming

17. Gottfried alleges that during the past license term each of the licensees failed to offer programming directed at the special needs of the hearing impaired. Furthermore, she urges that the stations' public inspection files do not reflect any annual listing of problems-programs relating to the hearing impaired.

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[7] The community leader ascertained by the licensees included: Marcella M. Meyer, Executive Director, GLAD, interviewed by KABC-TV and KCET-TV; L. Ronald Jacobs, Head of Student Personnel, Campus Services for the Deaf, California State University, Northridge, California, interviewed by KABC-TV; Lenny Meyer, Present of GLAD, and James K. Riley, Chairman, Youth Forces of GLAD, contacted by KCET-TV; Dr. Edgar L. Lowell, John Tracy Clinic, interviewed by KTTV; Dennis Landesman, President, Children Hear More Institute ascertained by KTLA-TV. In addition, KABC-TV interviewed Father George Doran, Los Angeles Director, Deaf CCD Projects, KNBC-TV contacted Sarah McDonald, Director of Inglewood Hearing and Speech Center, and KHJ-TV ascertained Ms. Dottie Soltis, Directors of Interpreters, La Trade Tech College.

18. Regarding the annual problems-programs listings, Sections 1.526 and 1.527 of the Commission's Rules and Regulations require commercial and non-commercial television licensees to place annually in their public inspection file a list of not more than ten significant problems that were served by the station during the preceding 12 months and the programs offered in response to those problems. There is no requirement that a station program in response to every ascertained need or that it itemize every ascertained need. Thus, the absence of any particular need does not, without more, serve to question a licensee's programming efforts.

19. In order to warrant a hearing on a licensee's past programming, a challenger must plead specific facts which give rise to a substantial and material question as to whether a licensee abused its discretion in its selection of programming matter to serve the needs and problems of its community of license. Here, petitioner would have us reach that conclusion against all the licensees based solely on her contention that the stations did not offer specific programs directed at the hearing impaired.

20. Our review of the licensees' renewal applications and oppositions reveals numerous programs aired during the past license period *about* the deaf and hearing impaired. Few, however, were *for* the hearing impaired.[8] Apparently, it is this

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[8] For instance, KTLA-TV relates that it attempts, whenever possible, to supplement its programming with visual materials: News — maps used to locate stories, text of testimony in court cases is visually depicted, color slides used to characterize story, and close-ups of newscasters permit lip reading; Weather — visual depiction of forecast and conditions as well as utilization of visual weather symbols; and Sports — visual display of scores, standings, and time remaining. Another station, KTTV, offered a sign language portion of its daily prime-time news program for four-and-one-half years. Presently, the station visually captions a special summary of the news. In addition to the *Captioned ABC News,* KCET has offered PBS programs that have provided visual assistance for the aurally handicapped.

point that the challenger is really raising. Over the past decade, broadcasters, in response to an ascertained awareness of special needs of their community's minority and ethnic populations, have been offering programs not only *about* but also specifically *for* such groups. Generally speaking, such programming can be achieved without any additional production techniques other than those utilized for regular programming. Obviously, that is not the situation confronting a licensee who might wish to program for the aurally handicapped. For such programming to be effective, it must offer some specific form of visual communication: sign language interpretations, captioning, or extensive utilization of charts, signs, and facial closeups to permit lip reading. Even sign language and lip reading efforts, according to Gottfried, serve to limit the number of deaf and hearing impaired since many do not effectively understand these methods. As noted earlier, there is no Commission requirement for such specialized programming techniques and, accordingly, there is no basis to fault a licensee for failure to provide these options for the deaf and hearing impaired in the station's service area. Therefore, we fail to find that a substantial and material question has been raised.[9]

Section 504 of the Rehabilitation Act

21. The aurally handicapped population of Los Angeles is excluded from participation in and denied the benefits of television and, thus, according to Gottfried, the licensees

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[9] In addition to the programming allegations previously discussed, petitioner contends that KCET-TV refused until May 23, 1977, to begin airing the *Captioned ABC News* despite its availability from PBS and that when it did begin to air the program, it was scheduled at the inappropriate time of 11:30 P.M. Programming decisions as to what to air and when to air it are discretionary matters normally left to the licensee. It is only where an abuse of such discretion has been shown that the Commission questions a licensee's programming or scheduling. We have not been presented any supportive evidence to indicate such an abuse by KCET-TV.

herein have been and continue to violate Section 504 of the Rehabilitation Act of 1973. In this regard, the challenger contends generally that seven of the licensees receive an unidentified amount of federal financial assistance while at the same time discriminating against the deaf and hearing impaired which is prohibited by Section 504. Further, she avers specifically that non-commercial KCET-TV receives 30% of its funding from federal grants yet does not provide the required service to the deaf and hearing impaired.

22. The section in question, "Nondiscrimination Under Federal Grant," Title 29, United States Code, Section 794, states that no handicapped person shall be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any program or activity which receives federal financial assistance. We find merit to the argument raised in the oppositions concerning the applicability of this law to commercial broadcast licensees and, therefore, fail to see how this section applies to the seven commercial licensees now before us. While non-commercial KCET-TV — which apparently receives federal grants — might fall within the purview of the Rehabilitation Act and a violation thereof would be a matter to be considered by the Commission, petitioner has not indicated that the Department of Health, Education, and Welfare — the proper governmental agency to consider such matters — either has made such a determination or has even been asked to make such a determination. Thus, there is no reason to consider this allegation further against any of the licensees. However, in the event some adverse finding were to be made relative to Section 504, the Commission would take whatever action would be appropriate.

Conclusion

23. It is clear from the above discussion that there is no legal basis to the challenges against the eight television stations. However, the Commission is extremely sensitive to the concern that Ms. Gottfried personally has expressed and that she undoubtedly shares with the objectors and the country's

hearing impaired. For them, television is not a viable means of communications. At present, neither the Communications Act nor our rules and regulations provide a solution for this segment of society. Hopefully, resolution of some of the unanswered questions prevalent in Docket 20693 and technological advances will both serve to ameliorate the situation.

24. Programs such as the captioned news on PBS aid the aurally handicapped citizen in being linked with the nation; however, few licensees provide a similar link with the local community. Therefore, we urge all television licensees to review the options presently available that, within reason, might provide some of the benefits of the medium of television for this nation's hearing impaired.

25. We must conclude, however, that Ms. Gottfried and the informal objectors have failed to allege specific facts which raise any substantial or material question as to whether a grant of the renewal applications before us would serve the public interest, convenience, and necessity. While we are able to make the necessary statutory finding of Section 309 of the Communications Act of 1934, as amended, to grant renewals of license to KNBC-TV, KNXT-TV, and KTLA-TV, due to various matters still pending before the Commission, the other five stations can not be renewed at this time.

26. Accordingly, IT IS ORDERED, That the petitions to deny the 1977 license renewal applications of the eight Los Angeles, California, television stations, identified in footnote 1, filed by Sue Gottfried, the Greater Los Angeles Council on Deafness, Inc., and its component organizations, and several hundred residents of the stations' service area ARE DISMISSED as to all but Sue Gottfried.

27. IT IS FURTHER ORDERED, That the petitions filed by the area residents are considered as informal objections.

28. IT IS ALSO ORDERED, That the petitions to deny and the informal objections ARE DENIED.

29. IT IS ALSO ORDERED, That the application for renewal of license for Station KNXT-TV, Los Angeles, California, IS HEREBY GRANTED for a short-term — until August 1, 1979 — pursuant to the Commission's By Direction Letter of July 12, 1978, FCC 78-506, subject to the condition imposed in *CBS Inc.*, 57 FCC 2d 505(1976).

30. IT IS ALSO ORDERED, That the application for renewal of license for Station KNBC-TV, Los Angeles, California, IS HEREBY GRANTED subject to the conditions imposed in *National Broadcasting Company, Inc.*, 56 FCC2d 411(1976).

31. IT IS ALSO ORDERED, That the application for renewal of license for Station KTLA-TV, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO,
Secretary.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re
Petition for Reconsideration of Commission's Action in License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California

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Memorandum Opinion and Order

(Adopted: May 29, 1979; Released: June 15, 1979)

BY THE COMMISSION: COMMISSIONER JONES NOT PARTICIPATING

1. The Commission has before it a petition requesting reconsideration of its Memorandum Opinion and Order, released September 8, 1978, [69 FCC 2d 451 (1978)], filed by Sue Gottfried, individually and on behalf of the deaf and hearing impaired population within the stations' service areas,[1] and the Greater Los Angeles Council on Deafness, Inc. [hereinafter referred to as GLAD]; oppositions to that petition filed by the respective licensees; and petitioners' responses to those oppositions.[2]

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[1] The stations, licensees, and file numbers involved are: KABC-TV, American Broadcasting Companies, Inc., BRCT-61; KCET-TV, Community Television of Southern California, BRET-80; KCOP-TV, KCOP Television, Inc., BRCT-102; KHJ-TV, RKO General, Inc., BRCT-58; KNBC-TV, National Broadcasting Company, Inc., BRCT-81; KNXT-TV, CBS, Inc., BRCT-139; KTLA-TV, Golden West Broadcasters, BRCT-100; and KTTV-TV, Metromedia, Inc., BRCT-64. Station KHJ-TV had not filed a renewal application as it was in hearing status (Dockets 16679 and 18759); however, it did file an opposition to the petition to deny.

[2] The Commission also has before it a Supplement to Petition for Reconsideration, filed October 30, 1978, and a Second Supplement to Petition for Reconsideration filed November 20, 1978. While

Background

2. Petitioners filed petitions to deny the subject stations' renewal applications alleging that their ascertainment efforts were defective as to the deaf and hearing impaired community, their past programming had not met the needs of that segment of the population, and the licensees had violated Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] by their failure to offer programming understandable to the aurally handicapped.

3. The Commission's September 8, 1978, Order denied those petitions. In so doing we granted standing to petitioner Gottfried but denied it to GLAD and its component organizations. The Order found that the subject licensees had violated no Commission requirement in their ascertainment efforts as we have no requirements that stations specifically ascertain the needs of the deaf or supply demographic data relating to an area's hearing impaired population.[3] With regard to programming, we found that petitioner had failed to raise a substantial and material question as we have no requirement that

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neither of those pleadings are authorized by Section 1.45 of the Commission's rules, we will consider the allegations contained therein.

[3] We did note, however, that licensees have the option of ascertaining the needs of that segment of the community as an "other" checklist category and that these licensees had ascertained leaders in the health, welfare and elderly elements of the community and, in many cases, had included leaders involved with the concerns of the physically handicapped, including the deaf and hearing impaired. We have recently proposed to amend the *Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants* with respect to the "other" checklist category to require licensees to consult with any element or institution which is significant in their communities even if it is not one of the nineteen checklist categories. *In the Matter of Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey,* 69 FCC 2d 1815 (1978).

stations utilize special captioning techniques for the hearing impaired. Finally, we rejected petitioners' contention that the licensees had violated Section 504 of the Rehabilitation Act as it does not appear that this Section applies to commercial broadcast licensees. While Section 504 appears to apply to KCET-TV, petitioner had failed to show that the appropriate agency, the Department of Health, Education and Welfare, had been asked to make, or had made, a determination that KCET-TV had violated the Section.

4. On reconsideration, petitioners assert that because nondiscrimination against the handicapped is a national policy, the Commission must find that a failure by these licensees to observe that policy contravenes the public interest, and requires the denial of their renewal applications. Petitioners additionally resurrect the argument that Section 504 of the Rehabilitation Act of 1973 is applicable and has been violated by the subject licensees. GLAD alleges that KCET-TV receives direct subsidies from the Federal government, and the commercial licensees are within the purview of this statute because they or their "parent organizations," do business with the Federal Government. Petitioners claim that the licensees' business contracts with the Federal Government are a matter of record in the Commission's own files. Petitioners argue that the licensees' failure to do anything to meet the needs of some 14 million deaf and hearing impaired citizens, in the face of national policy and Commission concern to the contrary, contradicts any finding that the public interest would be served by the renewal of the subject licenses. Additionally, petitioners contend that the Commission, in its Order, failed to make a factual, or legal, finding that the grant of the applications of the three stations granted renewal would serve the public interest, convenience and necessity.

5. With regard to GLAD's standing, petitioners claim that the affidavit submitted by Marcella M. Meyers, GLAD's Executive Director, contained sufficient specific allegations to demonstrate that GLAD was a party in interest, and, because a majority of GLAD's component organizations supported

the petition, the organization's bylaws provide that all its members bound by that vote.[4]

6. With regard to ascertainment, petitioners assert that the Commission "lumped" the ascertainment efforts of the licensees and thereby gave credit to stations which did not conduct a survey along with those that did. Petitioners likewise dispute our conclusion that the licensees' failure to provide specialized programming for the deaf and hearing impaired did not warrant further inquiry on our part. The basis of petitioners' objection regarding this issue is that the techniques for such programming are currently available and would not, contrary to what we had stated, differ from production techniques utilized for regular programming. Petitioners state that "idiot cards" could be used to supply captions and, since they are already in use, would not require any additional production efforts. Additionally, petitioners contend that special production techniques and equipment are

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[4] When the original petitions to deny were filed by petitioners herein, they lacked affidavits from GLAD or any of its component organizations. Additionally, petitioner Gottfried, who did submit an affidavit, did not state that she was a resident of the community or a listener or viewer of the stations involved. Moreover, the licensees and the Commission received letters from several of the component organizations of GLAD indicating that they did not wish to join in the petition to deny. In response to the licensees' oppositions which took note of the above, Gottfried submitted another affidavit wherein she set out her residence as being within the service area of the challenged stations. Additionally, she submitted an affidavit from Marcella M. Meyer, GLAD's Executive Director, which stated that she was familiar with all of the organizations under the GLAD umbrella and that they were each directly interested in the problems of the deaf and hearing impaired. That affidavit, however, neither supported Gottfried's contention that the component organizations of GLAD backed the petition nor established GLAD itself as a party in interest. Accordingly, the Commission did not treat GLAD or its component organizations as petitioners but limited that status to Sue Gottfried, individually.

already used for other minorities such as separate make-ups and make-up techniques for black and white actors.

7. Petitioners' supplementary pleadings raise two new issues. In the first supplement, petitioners state that Public Broadcasting System stations aired a program entitled "From Paris With Love: An Evening of French Television," in July, 1978. That program included subtitles in English and petitioners state that PBS found as a result of this broadcast that viewers were not adverse to watching captioned programming. The second supplement alleged that the Commission has violated its obligations pursuant to Executive Order 11914 and Part 85 regulations adopted by HEW to implement Section 504 of the Rehabilitation Act. Petitioners state that it was incumbent upon the Commission to issue regulations to enforce Section 504 of the Rehabilitation Act no later than June 15, 1978, and, having failed to do so, it should now grant reconsideration and order hearings on the subject applications.[5]

Discussion

8. As an initial matter, we note that nearly all of the issues asserted by petitioners in support of their request for reconsideration were raised in petitioners' challenges to the renewal of the subject licenses.[6] It is well established that:

> ". . . reconsideration will not be granted merely for the purpose of again debating matters on which we have

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[5] We have also reviewed the oppositions filed by the licensees and the petitioners' response thereto. However, these pleadings are not separately discussed herein. Suffice it to say that the licensees contend that petitioners are merely reasserting contentions already rejected by the Commission and petitioners respond by denying the same.

[6] We also note that some of these allegations have been raised against the Commission and others by the instant petitioners in a case in the United States District Court for the Central District of California. *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California d/b/a KCET*, case No. CV-78 4715 R.

already deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685 (1964), aff'd *sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 842 (D.C. Cir. 165), *cert. denied*, 383 U.S. 967 (1965).

However, while it is not necessary that we discuss in detail allegations which we have previously ruled upon, we will, under our public interest mandate, in this instance, consider and discuss petitioners' arguments including those which had previously been raised in their petitions to deny.

9. *Section 504 of the Rehabilitation Act of 1973, as amended.* As we noted in our Order, released September 8, 1978, it was, and remains, our belief that Section 504 of the Rehabilitation Act does not apply to commercial broadcast licensees. That statute clearly applies to, "program(s) or activit(ies) receiving Federal financial assistance or . . . program(s) or activit(ies) conducted by any Executive agency or the United States Postal Service." Because the Commission is neither an Executive agency nor the United States Postal Service, the Act can only apply to its licensees if they are receiving "Federal financial assistance."

10. The Department of Health, Education, and Welfare has defined that term in its regulations. According to 45 C.F.R. §85(e), the term "Federal financial assistance," includes:

> ". . . any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:
>
> (1) Funds;
>
> (2) Services of Federal Personnel; or
>
> (3) Real and personal property or any interest in or use of such property, including
>
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government."

Other than procurement contracts, which are specifically excluded from the definition of "Federal financial assistance," the Commission does not provide any financial assistance to its licensees within the terms of the above-quoted definition. Moreover, except for the broad allegation that the licensees' parent organizations have contracts with the Federal government, petitioners have failed to demonstrate that the commercial licensees receive financial assistance from any other agency or department of the Federal government. Rather, petitioners characterize the respondents' Commission licenses as "contracts" which enable respondents to conduct a business and obtain financial profit and analogize this to receiving financial assistance from the government. Clearly, a Commission license is not a contract. Rather, it is a temporary, revocable, privilege conveying no property right, providing no service and transferring no financial interest. See generally, Sections 301 and 304 of the Communications Act of 1934, as amended, 47 U.S.C. 301, 304; *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940); and *Ashbacker Radio Corporation* v. *FCC,* 326 U.S. 327, 331-332 (1945). Therefore, petitioners have not shown that the commercial licensees are within the purview of the Rehabilitation Act.

11. Petitioners assert that KCET-TV, a non-commercial educational television station, is directly subsidized by the Federal government and thus comes within the scope of the Act. As we noted, previously, we would consider the bearing of a violation of the Act upon that licensee's qualifications should such a finding be made by the appropriate Federal agency. In our view, that agency is HEW. While at the time the subject Order was released we were not aware that HEW had been asked to make such a determination, we are now informed by petitioners that on March 13, 1978, a complaint against KCET-TV was filed with the HEW regional office.

However, petitioners also state that they have been advised by HEW that it is holding the complaint in abeyance pending the enactment of legislation by Congress to determine which agency has the responsibility to enforce compliance with the Rehabilitation Act. Thus, we again conclude that, with regard to KCET-TV, petitioners' allegation is premature. Should a determination later be made by the appropriate agency that KCET-TV did violate the Rehabilitation Act by failing to provide captioning, we would consider the effect of that determination upon the licensee's qualifications. Accordingly, petitioner has not supplied us with any material information which we have not already considered with regard to Section 504 of the Rehabilitation Act of 1973, as amended, and we will deny reconsideration as to that issue.

12. Finally, petitioners' claim that the Commission was required to adopt regulations to implement Section 504 of the Rehabilitation Act, and Executive Order 11914, is not supported by the evidence. Section 85.4(a) of HEW's rules implementing the Act and the subject Executive Order requires each agency to issue:

> ". . . a regulation to implement section 504 with respect to the programs and activities to which it provides assistance."

The term "agency", as it is used in these rules, is defined in Section 85.3(c) of HEW's rules. This definition is limited to:

> ". . . a Federal department or agency that is empowered to extend financial assistance."

As the Commission is not empowered to extend federal financial assistance, it is not an agency within the meaning of these rules and is not required by Section 85.4(a) of those rules to adopt regulations to implement Section 504. Thus, petitioners' claim that the Commission is required to promulgate rules implementing Section 504 is based upon a faulty premise and is without merit.

13. *Public Interest, Convenience and Necessity Determination.* Where appropriate, our grants of the subject renew-

al applications were properly based on statutory standards. In paragraph 25 of the subject Order, we stated:

> While we are able to make the necessary statutory finding of Section 309 of the Communications Act of 1934, as amended, to grant renewals of license to KNBC-TV, KNXT-TV, and KTLA-TV, due to various matters still pending before the Commission, the other five stations can not be renewed at this time.

Thus, as to three specifically mentioned stations, we found that we were able to make the "necessary statutory finding of Section 309 of the Communications Act of 1934, as amended," and granted renewal of the licenses. The only reasonable interpretation of that language includes finding that the public interest, convenience and necessity would be served by the grant. To whatever extent petitioners may not have understood our statutory finding, we reaffirm it herein.

14. Petitioners contend that by reason of our failure to require captioning or other techniques to enable the deaf and hearing impaired to have full access to television broadcasts, we have failed to act in the public interest and the fact that the licensees failed to provide such service rendered their performance a violation of the public interest. However, the subject Order contained an extended discussion of our actions regarding television licensees and the nation's hearing impaired. At the conclusion of that portion of the Order, we noted that:

> Thus, there is no requirement that any television licensee — commercial or non-commercial — provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information.

We find no error and nothing inconsistent in concluding that licensees are serving the public interest although they are not currently providing captioning, in view of the fact that we have not required licensees to undertake such an activity. Furthermore, to judge a licensee's qualifications on the basis of

the retroactive application of such a requirement would, in our opinion, raise serious questions of fundamental fairness. Thus, there is no inconsistency or error in our finding that the subject licensees had met their public interest burden even though they did not caption their programming.

15. *Ascertainment.* Petitioners charge that we "lumped" the ascertainment surveys of all of the subject licensees in determining that their ascertainment efforts were sufficient. This is not so. Rather, with regard to ascertainment, we stated that: 1) the Commission has no requirement that an applicant submit demographic data relating to an area's hearing impaired population with the ascertainment information included in a renewal application; and, 2) that even though there is no requirement for licensees to ascertain community leaders of the deaf, hearing impaired, and handicapped community as separate "checklist categories", many of the licensees herein did ascertain persons involved with "the whole range of concerns of the physically handicapped which includes the deaf and hearing impaired," as part of their ascertainment of leaders from the health, welfare, and elderly elements of the community.[7] Thus, we determined that the failure to include representatives of the aurally handicapped segment of society did not discredit the licensees' ascertainment efforts, We stand by this conclusion. As stated above, there is no current requirement that such persons be contacted, and it would violate our notions of fundamental fairness to retroactively impose such a new requirement upon licensees. We did not "lump" the efforts of the respondents. What we did conclude, parenthetically, was that even though there was no requirement, *most* of the licensees did ascertain leaders involved in the concerns of the physically handicapped, including the deaf and hearing impaired. Additionally, we noted that several of the licensees ascertained representatives from

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[7] We also noted that licensees have the option of ascertaining leaders from, by way of example, the deaf and hearing impaired community under the "other" checklist category.

GLAD and other groups identified by petitioner as constituting persons aware of the problems of the aurally handicapped. Thus, we find no error warranting reconsideration.

16. *Programming.* Petitioners fault the Commission for not having taken action against the respondents for their failure to provide captioning or other supplementary visual material for use by the aurally handicapped. Again, petitioners object to the Commission's refusal to take action against licensees for their failure to do something that we have not required them to do.[4] Again, it would violate our notions of fairness to retroactively apply such a new requirement.

17. *Standing of GLAD.* Petitioners' allegation of error in our denial of standing to GLAD and its member organizations is without merit. As discussed in the Order released September 8, 1978, GLAD was inconclusive about its desire to participate in the proceeding and several of its member organizations notified licensees and the Commission that they did not wish to join in the petition. Whether these organizations were able to effectuate their withdrawal from the proceeding under GLAD's by-laws is an internal matter of GLAD in which we would not presume to interfere. However, it would likewise be inappropriate for us to consider these organizations as parties to a petition which they expressly repudiated. In any case, because of the uncertainty of GLAD's intentions in this matter, it was entirely correct to conclude that it lacked standing. However, assuming *arguendo* that GLAD had conclusively demonstrated its standing as a party in interest, it does not follow that it has been aggrieved by the Commission's denial of standing to it as the petition which it sought to be a party to was fully considered

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[4] This conclusion is not affected by the petitioners' allegation that PBS's subtitled "From Paris With Love" program demonstrated that open captioning would be acceptable to the public. Even assuming, *arguendo,* that such is the case, we clearly have no requirement for such captioning and, as stated above, will not fault the licensees for their failure to provide it during the past license term.

on the merits. Thus, with regard to the issue of GLAD's standing, there has been no error warranting reconsideration.

Recent Developments

18. In our previous Order, we provided a background discussion of the Commission's actions regarding television licensees and the nation's hearing impaired. Since that time, further action has been taken which bears mention. Following the Commission's grant of authority in 1972 to the Public Broadcasting System (PBS) to initiate experiments in closed captioning utilizing the vertical blanking space of line 21 of the television broadcast signal and the Commission's adoption of rules in 1976 to permit closed captioning on Line 21 for visual display of aural material accompanying a television program,[9] PBS and the National Bureau of Standards (NBS), with funding provided by the Department of Health, Education and Welfare (HEW), have worked together on the development of the closed captioning technology. As a result of the experiments conducted by PBS and NBS, HEW recently announced the institution of a closed captioning project for the hearing impaired.[10] Participants in the project are PBS, ABC and NBC, which have agreed to provide a total of up to 20 hours of captioned programming a week by early 1980. The special decoding devices needed by the hearing impaired to enable them to see the captions will be provided by Sears, Roebuck & Co. with no mark-up for profit. HEW will help establish and fund a nonprofit National Captioning Institute that will caption programs for the television networks.

19. On April 5, 1979, the Commission received an extensive and comprehensive briefing on the progress of the closed captioning project by representatives of ABC, NBC, PBS and

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[9] *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf,* Docket No. 20693, 63 FCC 2d 378 (1976).

[10] *Broadcasting Magazine,* March 26, 1979, at 32-33.

HEW. As a result of the meeting, we are satisfied that important advances are being made toward achieving the goals which petitioners espouse and which we share — namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success.[11] However, if at a later date it is demonstrated that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if a rulemaking is warranted to ensure that the hearing impaired are not deprived of the benefits of television.

Conclusion

20. We find that the petitioners have raised no issue, have provided no new facts and have demonstrated no error in our previous decision which warrants the reconsideration of our Memorandum Opinion and Order released September 8, 1978, in this proceeding.

21. At the time the September 8, 1978, Memorandum Opinion and Order was released, renewal could not be granted to five of the challenged stations because of other matters then outstanding with regard to their applications. As these matters remain outstanding, no further action is being taken herein relative to their renewal applications.

22. Accordingly, IT IS ORDERED, That the Petition for Reconsideration, filed October 2, 1978, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO,
Secretary.

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[11] Transcript of Commission Meeting on Closed Captioning for the Deaf, April 5, 1979, at 3.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-1722

SUE GOTTFRIED, individually and on behalf of the deaf and hearing impaired population within the Stations' viewing area, and the Greater Los Angeles Council on Deafness, Inc., *Appellants*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

NATIONAL BROADCASTING COMPANY, INC., *et al., Intervenors*

BEFORE: Wright and McGowan, Circuit Judges and Gasch*, Judge, United States District Court for the District of Columbia

Order

(Filed June 8, 1981)

On consideration of the motion of intervenor Community Television of Southern California for leave to file supplement to petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED by the court that the Clerk is directed to file intervenor's lodged supplement and on consideration of the petitions for rehearing of appellee and of intervenor, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge McGowan would grant the petition for rehearing.

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-1722

SUE GOTTFRIED, individually and on behalf of the deaf and hearing impaired population within the Stations' viewing area, and the Greater Los Angeles Council on Deafness, Inc., *Appellants*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

NATIONAL BROADCASTING COMPANY, INC., *et al., Intervenors*

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

Order

(Filed June 8, 1981)

The suggestions for rehearing *en banc* of appellee and intervenor have been circulated to the full Court. A majority of the Court have not voted in favor of the suggestions. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestions of appellee and intervenor are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, *Clerk*

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges MacKinnon and Robb would grant the suggestions for rehearing *en banc*.

APPENDIX D

29 U.S.C. §794 provides:

§794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

47 U.S.C. §309 provides:

§309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier, services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for—

(A) A minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance

for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or require-

ments phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of emergency operations under subsection (b)

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) Classification of applications

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Form and conditions of station licenses

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

(June 19, 1934, ch. 652, title III, §309, 48 Stat. 1085; July 16, 1952, ch. 879, §7, 66 Stat. 715; Mar. 26, 1954, ch. 110, 68 Stat. 35; Jan. 20, 1956, ch. 1, 70 Stat. 3; Sept. 13, 1960, Pub. L. 86-752, §4(a), 74 Stat. 889; May 14, 1964, Pub. L. 88-306, 78 Stat. 193; May 14, 1964, Pub. L. 88-307, 78 Stat. 194.)

Joint Appendix

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

Nos. 81-231, 81-799

In the Supreme Court of the United States

OCTOBER TERM, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,
Petitioner

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITIONS FILED: AUGUST 14, 1981 (NO. 81-231);
OCTOBER 27, 1981 (NO. 81-799)
CERTIORARI GRANTED: JANUARY 11, 1982

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GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1722

DATE	FILINGS—PROCEEDINGS
(D)7-10-79	4-Appellant's notice of appeal from an order of the FCC (m-9)
(T)7-17-79	4-Notice of intent to intervene by National Broadcasting Company, Inc. (m-17) & (m-18)
(T)7-17-79	4-Notice of intent to intervene by Community Television of Southern California (m-17)
(D)7-18-79	Corrected certificate of service to Notice of intent to intervene by National Broadcasting Co., Inc. filed on 7-17-79
(D)7-19-79	4-Notice of intention to intervene by Metromedia, Inc. (m-19)
(D)7-20-79	4-Notice of intention to intervene by American Broadcasting Companies, Inc. (m-20)
(D)7-20-79	4-Notice of intention to intervene by KCOP Television, Inc. (m-20)
(D)7-23-79	4-Notice of intention to intervene by RKO General, Inc. (m-23)
(T)7-24-79	4-Notice of intention to intervene by Golden West Broadcasters (m-24)
(D)7-31-79	4-Notice of intention to intervene by CBS, Inc. (m-31)

DATE	FILINGS—PROCEEDINGS
(T) 8-20-79	Certified Index to Record (n-11)
(D) 9-13-79	4-Appellants' motion to extend time to file brief (m-12)
(E) 9-19-79	Clerk's order granting appellant's motion to extend time to file brief and appendix for a period of 60 days from the date of this order
(T) 11-8-79	4-Appellants' motion to extend time to file brief and appendix (m-7)
(D) 11-13-79	4-Appellants' motion to proceed under Rule 30(c), deferred appendix (m-7)
(E) 11-28-79	Clerk's order granting appellants' motion to proceed under Rule 30(c)
(E) 12-4-79	Order per CJ Wright granting appellant's motion to extend time to file brief and appendix to Jan. 19, 1980
(D) 1-17-80	3-Appellants' brief (m-16)
(D) 2-6-80	4-Appellee's consent motion for establishment of briefing schedule (m-6)
(E) 2-13-80	Clerk's order granting appellee's motion for establishment of briefing schedule as follows: April 21st—appellee's brief, May 6th—intervenors brief, June 5th—appellants reply brief and June 16th—joint appendix
(G) 4-21-80	4-Appellee's brief (m-21)
(E) 5-6-80	4-Intervenor's (Communites Television) brief (m-6)
(E) 5-6-80	4-Intervenor's (ABC, CBS, GWB, KCOP, Metromedia, NBC and RKO) joint brief (m-6)
(T) 5-22-80	Supplemental Certified Index to Record (OK DMC) (n-12)

DATE	FILINGS—PROCEEDINGS
(C) 6-2-80	4-Appellants' motion to extend time to file reply brief to 7/3/80 and joint appendix to 7/16/80 (m-30)
(C) 6-9-80	Clerk's order granting appellants' motion to extend time to file reply brief to 7/3/80 and joint appendix to 7/16/80
(T) 7-7-80	3-Appellants' reply brief (m-2)
(D) 7-16-80	15-Appellants' brief (m-15)
(D) 7-16-80	7-Joint Appendix (m-15)
(G) 7-29-80	25-Intervenors' (ABC, Inc. et al.) joint brief (m-29)
(G) 7-29-80	15-Intervenor's (Community Television of Southern California) brief (m-29)
(C) 07-31-80	15-Appellants' reply brief (m-29)
(T) 08-05-80	4-Appellee's motion for leave to file printed brief, late (m-5)
(T) 08-08-80	Notice of appendix correction under Rule 9(c), GRC (OK DMC)
(T) 08-18-80	Clerk's order granting appellee's motion for leave to file printed brief, late
(T) 08-18-80	15-Appellee's brief (m-5)
(C) 10-17-80	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appellants—20 minutes; Appellee—20 minutes.
(C) 11-05-80	Argued before CJ Wright, McGowan*, CJ and Gasch, USDC Judge for DC
(B) 12-04-80	Per Curiam order, sua sponte, that on or before 12-11-80, appellee FCC, file in the record in this case the following: 1) Current information regarding the development, by the FCC and by other agencies of government, of regulations

DATE	FILINGS—PROCEEDINGS
	concerning television programming for the deaf under Section 504 of the Rehabilitation Act of 1973.
	2) A copy of the affidavit of David S. Tatel, Director of HEW's Office of Civil Rights, that was attached to "Opposition of the Department of HEW to the Motion for Summary Judgment by Plaintiff and the Public Broadcasting Defendants," as well as the Opposition itself, in Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, d/b/a KCET-TV, Civil No. 78-4715-R (C.D. Cal.).
	3) A copy of the document transferring responsibility for coordinating federal implementation of Section 504 of the Rehabilitation Act of 1973 to the Department of Justice; CJ Wright, McGowan, CJ; and USDC Judge Gasch
(T) 12-11-80	4-Letter from counsel for FCC responding to order of 12/04/80 (m-11)
(T) 12-12-80	4-Intervenor's (Community Television) motion to direct filing of additional materials for the record (m-12)
(T) 12-17-80	Per Curiam order granting intervenor's motion to direct filing of additional materials for the record and appellee Federal Communications Commission is directed to file all pleadings submitted to the District Court in the same pleading cycle as the opposition of the Department of HEW to the motion for summary judgment by plaintiff and the Public Broadcasting defendants and to do so on or before December 22, 1980; CJ Wright; McGowan, CJ; and Gasch, Judge, US District Court for DC

DATE	FILINGS—PROCEEDINGS
(T) 12-24-80	1-Letter from FCC submitting additional parts of the District Court record (m-22) (OK RB)
(T) 12-31-80	4-Intervenor's (Community Television) motion for leave to lodge judicial orders (m-31)
(T) 01-29-81	Per Curiam order granting the motion of Community Television of Southern California for leave to lodge judicial orders; CJ McGowan; Wright, CJ; and Gasch, US District Court Judge for DC
(T) 01-29-81	4-Copies of judicial orders (LODGED PER ABOVE ORDER)
(T) 02-03-81	4-Letter dated January 23, 1981 from counsel for FCC advising of status (m-23) (OK RB)
(H) 4-17-81	Opinion for the Court filed by Circuit Judge Wright
(H) 4-17-81	Opinion concurring in part and dissenting in part filed by Chief Judge McGowan
(H) 4-17-81	Judgment by this Court that the orders of the FCC on appeal herein are hereby affirmed in part, vacated in part, and the case is remanded to the FCC for further proceedings, all in accordance with the opinion for the Court filed herein this date.
(T) 04-27-81	4-Appellee's motion to extend time to file petition for rehearing to May 22, 1981 (m-27)
(T) 04-28-81	4-Intervenor's (Community Television) motion to extend time to file petition for rehearing and suggestion for rehearing en banc to May 22, 1981 (m-28)
(T) 05-01-81	1-Intervenor's (ABC) bill of costs (m-1)

DATE	FILINGS—PROCEEDINGS
(T) 05-01-81	4-Appellants' petition for (1) an award of reasonable attorneys fees; and (2) allowance of costs and out-of-pocket expenses (m-30)
(C) 05-06-81	Per Curiam order granting appellee's motion to extend time to file petition for rehearing to 5/22/81; CJ McGowan; Wright, CJ and Gasch, USDC Judge for DC
(V) 05-08-81	4-Appellee's motion for extension of time in which to reply to Appellants' petition for costs (m-8)
(T) 05-11-81	4-Intervenor's (Community Television) motion to extend time to file reply to appellant's petition for costs (m-11)
(T) 05-11-81	4-Appellants' opposition to intervenor's (ABC) bill of costs (m-7)
(T) 05-15-81	4-Appellants' opposition to appellee's motion to extend time to file response to appellants' petition for costs (m-11)
(T) 05-15-81	4-Transcript of oral argument
(V) 05-18-81	4-Appellants' opposition to intervenor's (Community Television) motion to extend time in which to reply to appellants' petition for costs (m-15)
(V) 05-22-81	15-Intervenor's (Community Television) petition for rehearing and suggestion for rehearing en banc (m-22)
(V) 05-22-81	4-Appellee's motion to extend time to file petition for rehearing and suggestion for rehearing en banc to May 26, 1981 (m-26)
(C) 05-28-81	Clerk's order that appellee's motion to extend time to file petition for rehearing, etc. is granted and the Clerk is directed to file appellee's lodged petition for rehearing and suggestion for rehearing en banc

DATE	FILINGS—PROCEEDINGS
(C) 05-28-81	15-Appellee's petition for rehearing and suggestion for rehearing en banc (m-26)
(V) 05-28-81	15-Intervenor's (Community Television) motion for leave to file supplement to petition for rehearing and suggestion for rehearing en banc (m-28)
(B) 06-22-81	Per Curiam order that the motions to extend time within which to file replies to appellants' petition for costs are granted for a period of seven (7) calendar days from the date on which an order is entered herein disposing of the pending petition for rehearing; Wright and McGowan, CJ's; and USDC Judge Gasch
(B) 07-08-81	Per Curiam order that the Clerk is directed to file intervenor's lodged supplement to petition for rehearing and suggestion for rehearing, en banc; and that the petitions for rehearing (filed by appellee and intervenor) are denied; Wright and McGowan, CJ's; and USDC Judge Gasch
(B) 07-08-81	15-Intervenor's (Community Television of Southern California) supplement to petition for rehearing and suggestion for rehearing, en banc (m-28)—filed per above order
(B) 07-08-81	Per Curiam order, en banc, that the suggestions for rehearing, en banc, (filed by intervenor and appellee) are denied; CJ Robinson, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJ's
(V) 07-13-81	4-Intervenor's (Community Television of Southern California) motion for stay of mandate pending review on certiorari (m-13)

DATE	FILINGS—PROCEEDINGS
(V) 07-15-81	4-Intervenor's (Community Television of Southern CA) opposition to appellants' petition for attorneys' fees, costs, and out-of-pocket expenses (m-15)
(V) 07-15-81	4-Appellee's opposition to appellants' petition for attorneys' fees and costs (m-15)
(V) 07-16-81	4-Intervenor's (CBS) memorandum concerning appellants' petition for attorneys' fees, costs and out-of-pocket expenses (m-16)
(V) 07-22-81	4-Appellee's response to intervenor's (Community Television) motion for stay of mandate pending review on certiorari (m-22)
(V) 07-28-81	1-Letter dated 07/20/81 from counsel for appellant advising of status (m-20) (OK, GF)
(B) 08-03-81	Per Curiam order that intervenor's (Community Television of Southern California) motion to stay issuance of mandate is granted and the Clerk is directed not to issue the mandate herein prior to August 14, 1981; Wright and McGowan, CJ's; and USDC Judge Gasch
(V) 08-03-81	4-Appellants' reply to oppositions of appellee and intervenor (Community Television of Southern California) to appellants' petition for attorneys' fees and costs (m-24) (OK, GAF)
(V) 08-14-81	4-Letter dated 08/14/81 from counsel for Community Television of Southern California advising of change of address, effective 08/24/81
(T) 08-18-81	Supreme Court called August 17, 1981 and advised that a petition for writ of certiorari was filed on August 14, 1981 in SC No. 81-289

DATE	FILINGS—PROCEEDINGS
(V) 08-19-81	Certified copy of notice from Clerk, Supreme Court that petition for writ of certiorari was filed on August 14, 1981 in SC No. 81-298
(V) 10-01-81	Copy of letter from Clerk, Supreme Court dated 09/29/81 extending time to file petition for writ of certiorari to 10/27/81 in SC No. A-260 (government)
(V) 10-13-81	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on 10/02/81 in SC No. 81-651
(V) 11-04-81	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on 10/27/81 in SC No. 81-799
(B) 11-12-81	Per Curiam order that no costs or attorneys' fees shall be awarded herein in favor of appellants (Gottfried, et al.) or intervenor (ABC, Inc.); Wright, CJ; McGowan, SCJ; and USDC Judge Gasch
(T) 11-20-81	4-Appellants' motion for enlargement of time to December 21, 1981 within which to file petition for rehearing (m-19)
(T) 12-11-81	4-Appellants' motion for leave to file petition for rehearing, time having expired (m-8)
(B) 01-11-82	Per Curiam order that appellants' (Gottfried, et al.) motion for enlargement of time within which to file a petition for rehearing (regarding the denial of costs herein) is granted and the Clerk is directed to file the lodged petition for rehearing and/or suggestion for rehearing, en banc, and to note the docket accordingly; Wright, CJ; McGowan, SCJ; and USDC Judge Gasch
(B) 01-11-82	15-Appellants' (Gottfried, et al.) petition for rehearing and suggestion for rehearing, en banc (m-8)—filed per above order

DATE	FILINGS—PROCEEDINGS
(V) 01-15-82	Certified copy of order from Clerk, Supreme Court denying petition for writ of certiorari in SC No. 81-651 on 01/11/82
(V) 01-15-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 31-298 on 01/11/82 (limited to Question 2 presented by the petition)
(V) 01-15-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 81-799 on 01/11/82

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

December 11, 1980

Mr. George A. Fisher, Clerk
United States Court of Appeals for
the District of Columbia Circuit
Constitution Avenue and John Marshall Place, NW
Washington, DC 20001

In Re: Gottfried v. Federal Communications Commission; No. 79-1722

Dear Mr. Fisher:

On December 4, 1980, the Court issued an order, *sua sponte*, requiring appellee Federal Communications Commission on or before December 11, 1980, to file in the record in the above-referenced case the following:

1. Current information regarding the development, by the Federal Communications Commission and by other agencies of government, of regulations concerning television programming for the deaf under Section 504 of the Rehabilitation Act of 1973.

2. A copy of the affidavit of David S. Tatel, Director of HEW's Office of Civil Rights, that was attached to "Opposition of the Department of HEW to the Motion for Summary Judgment by Plaintiff and the Public Broadcasting Defendants," as well as the Opposition itself, in *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California, d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.).

3. A copy of the document transferring responsibility for coordinating federal implementation of Section 504 of the Rehabilitation Act of 1973 to the Department of Justice.

With respect to these three informational requests, the Commission states as follows:

1. As explained in its brief and at oral argument, the Commission has not promulgated any regulations under Section 504 of the Rehabilitation Act of 1973 concerning television programming for the deaf or hearing impaired. Section 504 is only applicable to a program or activity receiving "Federal financial assistance." Because the Commission has concluded that it does not provide any "Federal financial assistance" to broadcast licensees, the Commission has not promulgated any regulations under Section 504. However, pursuant to its regulatory authority under the Communications Act, the Commission has taken actions to make telecommunications more accessible to the deaf and hearing impaired. See 47 U.S.C. §§ 303 (g), 307(a), 309(a). These steps are described at pp. 3-6 of the Commission's brief.

The Commission is also following developments undertaken by broadcasters in this area. As the Commission explained in its brief (at pp. 4-5) and at oral argument, the most important development to date in the effort to make television programming accessible to the deaf and hearing impaired is the closed captioning project. In 1976, the Commission adopted rules to permit closed captioning on Line 21 of the television broadcast signal for visual display of aural material accompanying a television program. *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, Docket No. 20693, 63 FCC 2d 378 (1976).[1] As a result of the Commission's

[1] Closed captioning is a process by which the audio portion of a television program is translated into captions (subtitles) which appear on the screen. Hearing-impaired viewers can then generally understand the dialogue of the program. Closed captions can only be seen on a television set equipped with a special decoding unit. The decoders are sold by Sears, Roebuck and Co. at cost with no mark-up for profit.

action, the Public Broadcasting Service (PBS), with assistance and funds provided by the Department of Health, Education and Welfare (HEW), instituted the closed captioning project using Line 21 as authorized by the Commission, and television programming with closed captioning began to be broadcast in March 1980. Participants in the project are PBS, ABC, and NBC; these networks are now broadcasting approximately 30 hours of closed captioned programming each week, with the amount expected to increase as more viewers buy decoders and as advertisers become aware of the audience for closed captioned programs.[2] In denying reconsideration of the license renewal decision now on appeal involving eight Los Angeles television stations, the Commission, after noting that it had received an extensive briefing on closed captioning, stated that:

> [W]e are satisfied that important advances are being made toward achieving the goals which petitioners espouse and which we share-namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success. 72 FCC 2d at 281.

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[2] Attached to this letter as Appendix 1 is information from the National Captioning Institute, Inc. (NCI), a non-profit organization charged with captioning programs for the benefit of hearing impaired persons, with contains information about closed captioning and a schedule of the programs to be captioned during the Fall 1980 television season. (While the *NCI News* states that the three networks will be broadcasting at least 22½ hours of closed captioned programming each week, the current figure has already reached approximately 30 hours per week, according to a report received from David Kleeman, Public Affairs Assistant at NCI, in a telephone conversation with the undersigned on December 8, 1980).

Moreover, independent stations are taking various steps on their own to make their programming accessible to the hearing-impaired. See p. 10 at fn. 18 in intervenors' joint brief.

Other broadcasters are seeking to develop other technologies to make television available to the hearing-impaired.[3]

With respect to other federal agencies, the Department of Education is in the process of developing a regulation which would establish a compliance standard under Section 504 of the Rehabilitation Act for public television stations that receive "Federal financial assistance." On October 5, 1979, the Secretary of the Department of Health, Education and Welfare determined that Section 504 was applicable to public television stations that receive "Federal financial assistance." The Secretary of HEW instructed the Department's Office of Civil Rights to develop compliance standards for the accessibility of public television to the hearing impaired. On March 20, 1980, the United States District Court for the Central District of California, per Judge Manuel L. Real, issued an order which required HEW to complete promulgation of the regulation establishing a compliance standard by November 17, 1980. *Greater Los Angeles Council on Deafness,*

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[3] CBS, in lieu of participating in the closed captioning project, has been pursuing the development of a teletext system. On July 29, 1980, CBS filed a petition for rulemaking with the Commission seeking the issuance of rules which would allow television broadcast stations to transmit teletext. *Amendment of Part 73, Subpart E of the Rules Governing Television Broadcast Stations to Authorize Teletext*, RM-3727. The comment period on CBS' petition has closed and the staff is now reviewing the comments and preparing a recommendation for the Commission. Teletext is the generic term for systems that transmit alphanumeric information (letters, numbers, characters) to the home television receiver. Equipped with a special decoder, a television receiver can extract and translate the information, which is sent by special data signals, to appear as letters, numbers, and graphics on the television screen. Because a teletext system can provide captioning for programming, in addition to other visual information for the general public (such as shoppers' guides or updated transportation schedules), CBS believes that a teletext system would be more useful to and less expensive for the hearing impaired than the Line 21 closed captioning system. Pursuant to Commission authorization and commencing in the next few months, CBS-owned television station KNXT will institute a program audience test of teletext.

Inc. v. *Community Television of Southern California d/b/a KCET et al.*, No. CV78-4715-R (C.D. Cal.). (Pursuant to Section 505(e) of the Department of Education Organization Act, P.L. No. 66-88, § 505(e), 93 Stat. 691 (1979), the Department of Education and its Secretary were substituted as defendants for HEW and its Secretary in *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California d/b/a KCET* because the function of promulgating the compliance standard regulation had been transferred from HEW to the newly-established Department of Education.)

On October 31, 1980, the Department of Education filed a motion in the United States District Court seeking modification of Judge Real's March 20, 1980 Order to permit the Department to complete the promulgation of a compliance standard for public television by May 15, 1981. The memorandum and declaration of the Department's Assistant Secretary for Civil Rights, Cynthia G. Brown, filed in support of the motion recite the steps that have been taken to date to promulgate a compliance standard regulation. A copy of the memorandum and declaration are appended to this letter as Appendix 2 for the information of the Court.

On November 24, 1980, Judge Real granted, in part, the Department of Education's motion for modification of the March 20, 1980 Order. Although Judge Real has not entered a written order, he orally ordered the Department of Education to issue a notice of proposed rulemaking establishing a compliance standard by December 15, 1980, and a final regulation by February 17, 1981. He also set a status conference for April 6, 1981. The Department of Education has filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit from Judge Real's November 24, 1980 Order.[4]

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[4] On December 10, 1980, the Department of Education filed an application for stay pending appeal of the November 24 Order. A copy of the memorandum filed in support of the application for stay pending appeal is attached as Appendix 3.

In addition to the process of formulating a compliance standard, the Department of Education has adopted a policy that requires all programming produced in fiscal year 1980 and thereafter with funds provided by the Department to be captioned. The Department is also committed to captioning by the end of 1982 all programs produced prior to 1980 without captions. Thus, many programs produced and broadcast prior to the captioning requirement will have captions if they are rebroadcast.[5]

The Department of Commerce has participated in the process of formulating a compliance standard at the Department of Education because the Commerce Department provides Federal financial assistance in the form of grants to assist in the planning and construction of facilities for public television stations. See 47 U.S.C. §§ 390-394. The attached declaration of Cynthia G. Brown, Assistant Secretary for Civil Rights, Department of Education, states that the Department of Education staff has held several meetings with the Department of Commerce concerning the drafting of a compliance standard regulation. See para. 15 of the Declaration and also p. 3 of the memorandum in support of the motion to modify order of March 20, 1980.

2. A copy of the affidavit of David S. Tatel that was attached to the "Opposition of the Department of HEW to Motion for Summary Judgment by Plaintiff and the Public Broadcasting Defendants" and the Opposition itself are attached as Appendix 4.

3. A copy of Executive Order 12250, dated November 2, 1980, transferring responsibility for coordinating federal

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[5] The information contained in this paragraph was obtained by the undersigned in a telephone conversation on December 10, 1980 with Joanne Durako, Office of General Counsel, Department of Education. See also "Opposition of the Department of HEW to the Motion for Summary Judgment by Plaintiff and the Public Broadcasting Defendants," p. 15, attached to this letter as Appendix 4.

implementation of Section 504 of the Rehabilitation Act of 1973 to the Department of Justice is attached as Appendix 5.

Very truly yours,

/s/ Randolph J. May
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Oct. 31, 1980]

Civil No. CV 78-4715-R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL., PLAINTIFFS

v.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA d/b/a KCET, ET AL., DEFENDANTS

MEMORANDUM IN SUPPORT OF MOTION TO MODIFY ORDER OF MARCH 20, 1980

Date: November 24, 1980

Time: 10:00 a.m.

On March 20, 1980, this Court issued an Order remanding to the Department of Health, Education and Welfare (HEW) the matter of developing a compliance standard under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The compliance standard will set forth the scope of the obligation of public broadcasters that receive federal financial assistance to make their programs accessible to the hearing impaired. The Court's Order required the Department to complete promulgation of the compliance standard no later than November 17, 1980.* *See* ¶ 3 of the Court's Order of March 20, 1980.

On May 19, 1980, pursuant to section 505(e) of the Department of Education Organization Act, Pub. L. No. 96-88, § 505(e), 93 Stat. 691 (1979) (to be codified at 20 U.S.C. § 3505(e)), a notice was filed with the Court substituting the Department of Education and its Secretary, Shirley M. Hufstedler, as defendants for HEW and its Secretary. The Notice of Substitution of Parties was supported by declarations that established that the function of promulgating the compliance standard had been transferred from HEW to the newly-established Department of Education (ED). The Department of Education has proceeded in good faith with the work of developing the compliance standard, but despite its efforts the promulgation process has not yet been completed. The work of the now-succeeded defendant HEW and of the Department of Education to develop the compliance standard are described in the accompanying declaration of Cynthia G. Brown, the Assistant Secretary for Civil Rights in ED.

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* The Order was appealed by notice filed May 19, 1980.

On the basis of the facts set forth in the Assistant Secretary's declaration, the defendant Department of Education and its Secretary respectfully move this Court to modify its prior Order to permit the Department additional time within which to complete the promulgation process. The declaration of the Assistant Secretary sets forth a schedule for publication of a Notice of Proposed Rule Making embodying the compliance standard, a comment period within which interested parties may comment on the proposed regulation, and publication of a final rule that will permit the agency to complete the promulgation process in an orderly fashion. The schedule contemplates submission of a final rule to the Federal Register by May 15, 1981. On that basis, the Department moves for a modification of the March 20, 1980 Order to extend the time within which the compliance standard shall be promulgated to May 15, 1981.

Te declaration of the Assistant Secretary establishes that the Department of Education and its predecessor defendant HEW have proceeded in good faith and with due diligence to develop the compliance standard. HEW established a study group within its Office for Civil Rights to develop the regulation in consultation with other offices within HEW and with the Department of Commerce.*

¶ 9 of the Declaration of Cynthia G. Brown (Declaration). The study group began the process of gathering information necessary to resolve policy questions pertaining to the drafting of the compliance standard and of analyzing legal issues related to the regulation. ¶¶ 10, 11. On May 4, 1980, the Department of Education was established, and the functions of the study group were transferred to the Office of the Assistant Secretary for Civil Rights (OCR) in the new Department. ¶ 12. After a temporary disruption in the work of the study group dur-

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* Pursuant to the Public Telecommunications Act of 1978, the Department of Commerce provides facilities grants to public broadcasters for the purchase of broadcast equipment and the construction of facilities.

ing its relocation to the new Department, the study group convened a meeting on June 20, 1980 at which it circulated a first draft of the regulation for comment. ¶¶ 13, 14. Between June 20 and August 1, the OCR study group circulated subsequent drafts and attempted to draft a regulation that would represent the views of all interested government offices. ¶ 15. Between August 1 and September 25, the study group completed drafting of the regulation and a decision memorandum for the Secretary. These documents were processed through the responsible offices within OCR during that period. ¶ 16. On September 25, 1980, OCR submitted its draft regulation and decision memorandum to the Department's formal clearance process. The clearance process is described in ¶ 17, and is designed to ensure that matters presented to the Secretary have been considered by all appropriate offices of the agency and agreed upon by those offices to the extent possible before presentation to the Secretary. Upon consideration of the OCR draft regulation, several of the offices of the Department submitted comments indicating that they did not concur in OCR's draft. ¶ 18. This has required OCR's consideration of the comments and may require OCR's redrafting of the regulation based on those comments. The declaration of the Assistant Secretary states that she anticipates that a final draft regulation will clear the Department and be submitted to the Federal Register for publication as a Notice of Proposed Rule Making by January 16, 1981.

The declaration of the Assistant Secretary also establishes a schedule for completion of the promulgation of the regulation that is consistent with the Department's responsibilities under section 504 and the requirements of the Administrative Procedure Act. Following publication of the Notice of Proposed Rule Making in the Federal Register, all interested members of the public may submit comments on the Proposed Rule. The present draft of the regulation contemplates a 45-day comment period. Under this schedule, the comment period would close on March 9, 1981. ¶ 26(b). After the close of the comment period,

the agency will incorporate the comments where appropriate in the text of the regulation and will summarize and address the substance of the public comments in the preamble to the Final Rule. ¶ 26(c). Once this process has been completed by OCR, the Final Rule will be submitted to the Departmental clearance process. The Assistant Secretary's declaration estimates that the Final Rule can be submitted to the Federal Register by May 15, 1981. *Id.* This schedule is consistent with the requirements of notice and comment rule making under the Administrative Procedure Act, 5 U.S.C. § 553.

For the foregoing reasons, the Court should grant the Department of Education's Motion to modify the March 20, 1980 Order to permit the Department to complete promulgation of a compliance standard by May 15, 1981.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Oct. 31, 1980]

Civil No. CV 78-4715-R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL., PLAINTIFFS,

v.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA d/b/a KCET, ET AL., DEFENDANTS

Date: November 24, 1980

Time: 10:00 a.m.

DECLARATION OF CYNTHIA G. BROWN

Cynthia G. Brown declares and states as follows:

1. I am presently the Assistant Secretary for Civil Rights in the Department of Education. From May 4, 1980 to August 4, 1980, I was Acting Assistant Secretary for Civil Rights in this Department. I am responsible for carrying out the Department's obligations under various civil rights statutes including section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.

2. From September 1977 to November 1979, I was Principal Deputy for Civil Rights in the Department of Health, Education and Welfare (HEW). Prior to the creation of the Department of Education (ED), I was on the transition team that was responsible for establishing the Department of Education pursuant to the provisions of the Department of Education Organization Act, Pub. L. No. 96-88.

3. Prior to May 4, 1980, my responsibilities did not include direct involvement in the development of the section 504 compliance standard applicable to public television. I was, however, generally aware of the Department's involvement in the litigation of *Greater Los Angeles Council on Deafness et al.*, v. *Community Television of Southern California d/b/a KCET, et al.*, Civil No. CV-78-4715 R (C.D. Cal., filed December 12, 1978). Staff assigned to the study group that is developing the compliance standard presently work under me, and information in this declaration with respect to their work prior to May 4, 1980 was provided to me by them.

4. On or about October 5, 1979, then Secretary of the Department of Health, Education and Welfare, Patricia Roberts Harris, acting upon the recommendation of the

Office for Civil Rights (OCR), concluded that section 504 was applicable to public television stations that receive federal financial assistance.

5. Secretary Harris instructed OCR to develop compliance standards for the accessibility of public television to the hearing impaired. In developing those standards, OCR was also directed to work closely with other offices within HEW and to consult with the Department of Commerce which provides grants that assist public broadcasters to build and purchase equipment for their broadcast facilities.

6. Secretary Harris' decision that section 504 was applicable to public television was set forth in HEW's Opposition To The Motions For Summary Judgment By Plaintiffs And The Public Broadcasting Defendants (dated October 25, 1979) and in the Declaration Of David S. Tatel attached to the Opposition.

7. In its Opposition, HEW informed this Court that several factual issues needed to be investigated before a compliance standard could be developed. Those issues included, but were not limited to, the following:

a. What are the costs of making public broadcasting programs accessible to hearing impaired?

b. How would the costs of making such programming accessible be distributed?

c. Whether cost considerations would make it advisable to establish a compliance standard which requires that less than all public broadcasting programs be made accessible to the hearing impaired?

d. Would particular methods of making public television accessible to the hearing impaired, such as open captioning or cameo signing, be seen as so intrusive by the general viewing public that their use would decrease the size of the audience for public television broadcasts?

e. Does the state of existing technology limit the types of amount of programming that can be made accessible to the hearing impaired?

8. On March 20, 1980, the Court issued an order remanding the matter of a compliance standard to HEW and requiring that a compliance standard be promulgated by November 17, 1980.

9. Recognizing that any compliance standard would represent the initial specific regulation of public broadcasting by the Department and that it would also involve resolution of sensitive legal and policy questions, OCR established a study group to consult with staff of other offices within HEW and other interested federal agencies.

10. Beginning with its first meeting on March 19, 1980, the OCR study group undertook to gather factual information from organizations including, among others, the Public Broadcasting Service, the Corporation for Public Broadcasting, and the National Captioning Institute.

11. Between March 19, 1980 and May 4, 1980, the HEW study group did the following:

a. discussed its work with the Department of Commerce;

b. held meetings with staff members of several HEW offices;

c. contacted several organizations to gather facts needed to develop the compliance standard;

d. identified and considered legal issues relevant to the development of the compliance standard.

12. On May 4, 1980, the Department of Education was established. The Department of Education Organization Act transferred from HEW to the new Department administration of programs that provide financial assistance for the production of television programs shown on public television and administration of the program that has funded the development of the

closed-captioning technology and the National Captioning Institute. HEW's responsibility under Executive Order 11914 for government-wide coordination of section 504 regulations was not, however, transferred to the Department of Education, but remained in the new Department of Health and Human Services. In view of the transfer of those programs through which financial assistance is provided for the production of television programs and the program with expertise in the technology of providing the hearing impaired with access to television, the public television study group in HEW/OCR was also transferred to the Department of Education. The study group is now a function of the Office of the Assistant Secretary for Civil Rights in ED.

13. The process of establishing the new Department temporarily disrupted the activities of the public television study group. The organization of the new Department and of the office of the Assistant Secretary for Civil Rights within the new Department (also OCR) is somewhat different from that of HEW and the Office for Civil Rights in HEW. The changes in organization required establishing new procedures, lines of authority, and working relationships. In addition, the relocation of the study group in the new offices of the Department of Education inevitably involved interruption in the work of the group while office equipment was moved and telephones installed.

14. On June 20, 1980, the Office for Civil Rights in ED convened a meeting at which it circulated for comment its initial draft of a proposed regulation.

15. Between June 20 and about August 1, 1980, the Office for Civil Rights circulated several subsequent drafts of a proposed regulation and held a number of meetings with staff from Department offices other than OCR and from the Department of Commerce. OCR involved persons from outside of OCR in an attempt to elicit their views and to incorporate them in a proposed regulation that would then reflect the position of all

interested parties. During this period, as issues were raised that required further factual information, OCR continued to gather data from sources outside the Department.

16. Between August 1 and September 25, 1980, OCR refined the draft regulation and an explanatory preamble. It also drafted a lengthy decision memorandum for the Secretary that described the basis for the regulation and provided an explanation of the proposed regulatory provisions. The memorandum also summarized the initial positions of ED offices concerning the draft regulation. Within OCR, these documents were reviewed and cleared by the study group staff, the Division Director for Elementary and Secondary Education in OCR's Office for Litigation, Enforcement and Policy (OLEP), the Deputy Assistant Secretary for Civil Rights (OLEP), the Principal Deputy to the Assistant Secretary for Civil Rights, and the Assistant Secretary for Civil Rights.

17. On September 25, 1980, the Office for Civil Rights submitted its proposed regulation to the Department's formal clearance process. The Departmental clearance process provides each interested Department component with an opportunity to comment formally on the regulation and to suggest changes. The clearance process also involves an assessment of the draft regulation's compliance with Executive Orders and Department rules governing regulation format, regulatory analyses and clarity of expression. The clearance process is designed to assure that matters presented to the Secretary for decision have been reviewed and agreed upon to the extent possible by all affected components of the Department before their presentation to the Secretary. In the case of the proposed regulation involved in this lawsuit, the Departmental clearance process requires review by the Office of the Secretary, the Office of Education Research and Information, the Office of Special Education and Rehabilitation Services, the Office of General Counsel, the Office of Planning and Budget, the Office of Legislation, and the Office of the Deputy Secretary for

Intergovernmental Affairs. This process is co-ordinated by the Division of Regulation Management in the Office of the General Counsel.

18. On October 17, 1980, in the course of the clearance process, the Office for Civil Rights received comments from Department offices. These comments raised objections to the draft regulation which will require revision of the proposed regulation prior to its publication in the Federal Register.

19. Before resubmitting the draft regulation to the clearance process, OCR must do the following:

(a) consult with interested Department offices concerning their comments and objections to the existing draft regulation;

(b) redraft the regulation to reflect the comments of Department offices where appropriate;

(c) if necessary on the basis of changes made in the redrafting of the regulation, rework the decision memorandum for the Secretary; and

(d) submit the draft for approval by the OCR offices described in ¶ 16, *supra*.

20. Once resubmitted to the Departmental clearance process by OCR, the revised draft of the regulation will be recirculated in the clearance process for final comments by interested Department offices. These comments will be summarized and included in the decision memorandum to the Secretary. At this point, the revised draft of the regulation, the decision memorandum, and the comments of interested Department offices will be submitted to the Secretary for her consideration.

21. If the Secretary does not approve the draft regulation, OCR will again revise it and resubmit it for clearance.

22. When approved by the Secretary, the draft regulation will be put into the form required by the Federal Register and submitted for publication.

23. The Federal Register normally publishes a proposed regulation one week after receipt.

24. OCR is currently redrafting the regulation for resubmission to the Department clearance process.

25. For all of the foregoing reasons, it is not possible to meet the Court's deadline for promulgation of the compliance standard.

26. I anticipate that promulgation of the final regulation setting forth a section 504 compliance standard for public television can be completed according to the following timetable:

(a) Submission of the Notice of Proposed Rule Making to the Federal Register by January 16, 1981.

(b) Close of the comment period by March 9, 1981. The present draft of the proposed regulation contemplates a 45-day comment period during which time all interested members of the public may submit comments on the proposed regulation.

(c) Submission of the Final Rule to the Federal Register by May 15, 1981. At the close of the comment period, all comments will be summarized, considered, and, where appropriate, the proposed regulation will be revised to incorporate the comments. The preamble of the regulation will be revised to include summaries of the comments and the Department's responses to the comments. Once this process is completed by OCR, the proposed Final Rule will be submitted to the Departmental clearance process described in ¶ 17, *supra*. Addressing the comments, revising the rule and processing the Final Rule through Departmental clearance will require two months.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on this 30 day of October, 1980.

/s/ Cynthia G. Brown
CYNTHIA G. BROWN

CERTIFICATE OF SERVICE

I certify that copies of the Notice of Motion, Motion to Modify Order of March 20, 1980, Memorandum in Support of the Motion to Modify and accompanying Declaration of Cynthia G. Brown were mailed, postage prepaid, first class, this 30th day of October, 1980, to:

by express mail

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. CV-78-4715 R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.,
PLAINTIFFS

v.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA
d/b/a KCET, ET AL., DEFENDANTS

MEMORANDUM IN SUPPORT OF DEFENDANTS' EX PARTE APPLICATION FOR A STAY PENDING APPEAL

On November 24, 1980, this Court issued an Order in open court mandatorily enjoining the defendant Department of Education and its Secretary, Shirley M. Hufstedler, 1) to publish a Notice of Proposed Rule Making (NPRM) with respect to the issue in this case by December 15, 1980; 2) to close the comment period with respect to the NPRM on January 26, 1981; and 3) to promulgate a final regulation on February 17, 1981. Defendants filed a notice of appeal from this Order on December 4, 1980.

The defendants are proceeding voluntarily to promulgate the regulation sought by the Court's Order. The Department cannot, however, meet the schedule imposed by the Court. Therefore, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, the Department and Secretary Hufstedler seek a stay, pending completion of appellate proceedings, of the mandatory injunction requiring promulgation of the regulation according to the schedule imposed by the November 24, 1980 Order. Alternatively, the defendants request that this Court grant a stay of the November 24th Order until such time as the United States Court of Appeals for the Ninth Circuit, or, if necessary, the United States Supreme Court, can rule on a motion for a stay.*

This ex parte application for a stay is necessitated by the imminence of the Order's December 15, 1980 deadline for publication of an NPRM.** Unless a stay

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* Defendants will seek expedited consideration by the Ninth Circuit of their motion for a stay, as well as expedited consideration of their appeal from the March 20, 1980 and November 24, 1980 Orders of this Court.

** Plaintiffs' counsel, Mr. Abraham Gottfried, was notified by telephone on December 9, 1980 that this application would be filed. As noted on the certificate of service, Mr. Gottfried's copy of the application was mailed by express mail simultaneously with the Court's copies. See Exhibit A to this memorandum.

is granted, defendants may be required to show cause why they should not be held in contempt before their appeal is heard by the United States Court of Appeals for the Ninth Circuit. "The purpose of [a stay] issued pursuant to [Rule] 62(c) is preservation of the status quo until the [appellate court] has acted on an appeal from an order granting or denying an injunction." *Klaus* v. *Hi-Shear Corporation*, 528 F.2d 225, 235 (9th Cir. 1975). The circumstances underlying defendants' request for a stay in this case meet the criteria for the granting of a stay pending appeal. It is well established under the decisions of this Circuit that a stay should be granted if (1) the appeal presents a substantial legal question, (2) the equities favor a stay, and (3) the public interest supports the granting of a stay. *Hotel & Restaurant Employees and Bartenders International Union* v. *Rollison*, 615 F.2d 788, 792 (9th Cir. 1980); *Warm Springs Dam Task Force* v. *Gribble*, 565 F.2d 549, 551 (9th Cir. 1977); *Jimenez* v. *Barber* 252 F.2d 550, 553 (9th Cir. 1958).

1. A Stay Should Be Granted Because Defendants' Appeal Poses A Substantial Legal Question

Whether this Court erred in imposing an involuntary schedule on the agency's publication of the regulatory compliance standard is a substantial legal question. The record of this case establishes that the defendants have proceeded in good faith and well within the bounds of their discretion to carry out their obligation to enforce section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, in the area of public television's accessibility to the hearing impaired. In the absence of a finding that the agency has unlawfully withheld or unreasonably delayed enforcement of the Act, 5 U.S.C. § 706(c), there is no basis for imposition of a Court-ordered schedule for enforcement of the Act. Nonetheless, the Court's March 20, 1980 Order imposing a schedule on the de-

fendants was not based on a finding that the agency had abused its discretion in enforcing the Act. Moreover, given the fact that the Court issued the Order after recessing trial of the action at the close of plaintiffs' case without an opportunity for the defendants to defend their enforcement of the statute, a finding that the agency had unreasonably delayed enforcement of the Act could not be said to be even implicit in the Court's March 20, 1980 Order. This Court's imposition of deadlines on discretionary action, in the absence of a finding that the agency has unreasonably delayed enforcement, persents a substantial legal issue. This issue is the basis of the defendants' appeal of the March 20, 1980 Order. Similarly, whether this Court erred in again asserting its authority over discretionary agency action in its November 24, 1980 revision of its previous deadlines for issuance of the compliance standard also presents a substantial legal question. *Environmental Defense Fund* v. *Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("Clearly relief delayed is not always equivalent to relief denied. There are many factors that result in delay, and a court is in general ill-suited to review the order in which an agency conducts its business. . . ."); *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856, 867 (4th Cir. 1961); *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1077 (7th Cir. 1976), *rev'd on other grounds*, 441 U.S. 677 (1979); *cf. FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) ("At least in the absence of substantial justification for doing other wise," a court reviewing discretionary agency action may not interfere with that discretion including the "time dimension of the needed inquiry. . . ."); *see also* cases holding mandamus inappropriate where agency action turns on matters of inference from loose statutory terms, *e.g.*, *Work* v. *Rives*, 267 U.S. 175, 183 (1925); *Wilbur* v. *Kadrie*, 281 U.S. 206, 219 (1930); *United States ex rel. Chicago*

Great Western R. Co. v. *Interstate Commerce Commission*, 294 U.S. 50, 62-63 (1935).

That the appeal in this case presents a substantial legal question is supported by the en banc decision of the United States Court of Appeals for the District of Columbia Circuit on the higher education issue in *Adams* v. *Richardson*, 480 F.2d 1159, 1164-1166 (D.C. Cir. 1973), a decision relied upon by plaintiffs in support of their suit against defendants. The District Court in *Adams* had held that the Department of Health Education and Welfare (HEW) had failed in its duty to enforce the non-discrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, by not taking appropriate steps to end segregation in public education institutions receiving federal funds. The District Court therefore ordered HEW to institute compliance proceedings against a number of state-operated systems of higher education and also to bring enforcement proceedings against a large number of secondary and primary schools that had been found to be segregated. On appeal, the Court of Appeals upheld the injunction of the District Court with respect to HEW action pertaining to primary and secondary schools, but reversed the District Court's order requiring enforcement proceedings with respect to the higher education systems. 480 F.2d at 1164. The Court's decision on the higher education issue was based on facts showing that, while guidelines for desegregating primary and secondary schools were well-established, there were no standards in the area of higher education, and that, despite the evidence of agency delay in that case, HEW must be permitted an adequate opportunity to develop standards in the important area of higher education.

> We agree with the District Court's conclusion that HEW may not neglect this area of its responsibility. However, we are also mindful that desegregation problems in colleges and universities differ widely from those in elementary and secondary schools,

> and HEW admittedly lacks experience in dealing with them. It has not yet formulated guidelines for desegregating state-wide systems of higher learning, nor has it commented formally upon the desegregation plans of the five states which have submitted them. *As regrettable as these revelations are, the stark truth of the matter is that HEW must carefully assess the significance of a variety of new factors as it moves into an unaccustomed area. None of these factors justifies a failure to comply with a Congressional mandate; they may, however, warrant a more deliberate opportunity to identify and accommodate them.*

Id., (footnote omitted). The Department of Education's promulgation of a compliance standard in this case also involves work in an uncharted area, and this Court should similarly accord the agency an opportunity to carefully assess factors affecting development of the new regulation. *See also Cherry* v. *Mathews*, 419 F.Supp. 922, 924 (D.D.C. 1976) ("the complex, difficult problems involved in fashioning guidelines to prevent discrimination against handicapped individuals" warrant the Court's retention of jurisdiction, but not the imposition of deadlines for the issuance of regulations.)

Finally, even if assuming *arguendo* there were no question that defendants had unreasonably delayed enforcement of section 504 or that the uncharted area of agency regulation required particular care for the formulation of new standards—points not conceded by defendants with respect to this case, the substance of the Court's November 24th Order would pose a substantial legal question. Simply put, it is impossible for defendants to meet the deadlines set in the Order. They cannot publish the NPRM by December 15, 1980; the period provided by the Court for comments is inadequate under the circumstances; and the time for reviewing and responding to the comments and promulgating the final

rule is simply not adequate. Furthermore, this Court has no basis and offered no reasons for its choice of the deadlines in the November 24th Order. Even in an instance in which an agency has been found to have unreasonably delayed in enforcement in an area in which the law is clearly established, not the circumstances in this case, the remedy selected by the court must be reasonable and not impossible to comply with. *Blankenship* v. *Secretary of HEW*, 587 F.2d at 335.

> Delay is a serious problem for both the federal courts and some federal administrative agencies. Simplistic and unreasonably short time limitations imposed from the outside without a thorough understanding of the reasons for the problem will frustrate [agency] administration, just as it would frustrate judicial administration.

Id.

The fact that this Court issued the November 24th Order does not require it to reject the defendants' application for a stay.

> Prior recourse to the initial decisionmaker [when seeking a stay pending appeal] would hardly be required as a general matter if [the district court] could properly grant interim relief only on a prediction that it has rendered an erroneous decision. *What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.*

Washington Metropolitan Area Transit Commission v. *Holiday Tours, Inc.*, 559 F.2d 844-45 (D.C. Cir. 1977) (emphasis added).

2. The Equities And the Public Interest Favor A Stay In This Case

The equities or the balance of irreparable harm and also the public interest favor a stay pending appeal. Litigation of this action indicates that the final regulation may well be challenged both by representatives of the hearing-impaired community and by public television broadcasters. Hasty and inadequate consideration of the regulation poses a risk that the compliance standards will be susceptible to an attack as being arbitrary and capricious. Government and judicial resources will be conserved by ensuring that the regulation promulgated has the benefit of full consideration by the agency.

Furthermore, the scope of the compliance standard regarding the accessibility of public television to the hearing impaired will have an impact on not only the hearing-impaired community, but also the larger hearing audience. The resources available to public television are limited, and the impact of the compliance standard on the allocation of those resources must be carefully considered. Neither community is served by promulgation, under the threat of contempt, of a regulation based on inadequate deliberation by defendants.

Finally, in light of the election of a new administration, promulgation of the compliance standard will now involve action by not only the current Secretary, but also the incoming Secretary of Education. The present Administration is continuing orderly consideration of the draft compliance standard, but promulgation of the final standard will require consideration by the new Administration. The public interest will not be served by court-imposed deadlines that preclude adequate time for briefing and consideration by the new Secretary.

Conclusion

For these reasons, this Court should grant defendants' ex parte application for a stay of its November 24, 1980

Order pending completion of appellate proceedings. Alternatively, this Court should stay its Order pending decision by the Ninth Circuit, or, if necessary, the United States Supreme Court, on a motion for a stay.

Respectfully submitted,

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Dated: December 9, 1980.

EXHIBIT A

Dec. 9, 1980

RJS:ABSobol:jld
145-16-1545

Telephone:
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Honorable Manuel L. Real
United States District Judge
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Re: Greater Los Angeles Council On Defenses, Inc., et al. v. Community Television of Southern California d/b/a KCET, et al., USDC CD Cal., Civil No. CV-4715-R

Dear Judge Real:

Pursuant to my obligation under Local Rule 3.18 of the Central District of California, this letter is to advise you that I have contacted counsel for the other parties to the above-captioned case with respect to the Department of Education's *ex parte* application for a stay pending appeal. Mr. Gottfried, a counsel for plaintiffs, opposes the application and requests to be heard when the application is considered by the Court unless on ititial reading you determine to deny the application. Mr. Czarra, counsel for KCET, Mr. McHugh, counsel for The Corporation for Public Broadcasting, and Mr. Page, counsel for the Public Broadcasting System, do not oppose the application and do not request to be present when the application is presented.

Mr. Gottfried will be unavailable to be heard by the Court on Wednesday afternoon, but will be available all day Thursday. Mr. Wolfson will represent the govern-

ment if plaintiffs' counsel makes an appearance, otherwise this application is submitted on the papers.

Sincerely,

/s/ Anne Buxton Sobol
ANNE BUXTON SOBOL
Attorney
Federal Programs Branch
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cc: all counsel

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Memorandum In Support Of Defendants' Ex Parte Application For Stay Pending Appeal were mailed, postage prepaid, first class, this 9th day of December, 1980, to:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. CV-78-4715 R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.,
PLAINTIFFS

v.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA
d/b/a KCET, ET AL., DEFENDANTS.

DECLARATION OF DAVID S. TATEL

David S. Tatel declares and states as follows:

1. I am the Director of the Office for Civil Rights in the Department of Health, Education and Welfare. That office is responsible for carrying out the Department's obligations under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Executive Order 11914, 41 Fed. Reg. 17, 871 (1976).

2. On or about October 5, Patricia Roberts Harris, Secretary of the Department, acting upon the recommendation of the Office for Civil Rights, decided that Section 504 was applicable to public television stations that receive Federal financial assistance and that it required for such stations, that public broadcasting be made accessible to the hearing impaired.

3. Secretary Harris has, in addition, instructed the Office for Civil Rights to recommend to her after consultation with other offices in the Department, (1) a procedure for establishing compliance standards and (2) a compliance standard under which a public television station's programming should be judged to determine if it meets the requirements of section 504.

4. The Office for Civil Rights has determined that numerous factual issues require investigation before a compliance standard can be established. These issues include but are not limited to:

a. What are the costs of making public broadcasting programs accessible to the hearing impaired?
b. How would the costs of making programming accessible be distributed among corporate grant makers, federal agencies, local public television stations and the Corporation for Public Broadcasting?
c. Whether cost considerations would make it advisable to establish a compliance standard which requires that less than all public broadcasting programs be made accessible to the hearing impaired.

d. Would particular methods of making public television accessible to the hearing impaired, such as open captioning or cameo signing, be seen as so intrusive by the general viewing public that their use would decrease the size of the audience for public television broadcasts?

e. Does the state of existing technology limit the types or amount of programming that can be made accessible to the hearing impaired?

5. The Department has not determined whether the compliance standard should be developed in the context of deciding the administrative complaint filed by Abraham Gottfried or through rulemaking proceedings conducted by HEW alone or in conjunction with other affected government agencies, e.g., the Commerce Department, the Federal Communications Commission, the National Endowments for the Arts and the Humanities, and the newly created Department of Education, either without or after public hearings. A memorandum advising the Secretary of the procedural options available to the Department is currently being prepared by the Office of General Counsel and the Office for Civil Rights.

6. How much time the Department will need to adopt a compliance standard will be affected by the method the Department selects for establishing the standard. Formulation of a compliance standard through adjudication of Mr. Gottfried's administrative complaint will take at least the time necssary to investigate the various relevant factual issues and to fashion a standard based upon these facts. Further, the Department may determine, given the complexity of the factual issues involved, that a reasonable compliance standard can be formulated only through a rulemaking proceedings. In that case, time will also be needed to draft and publish a proposed rule for public comment, to analyze the comments and make appropriate changes before publishing a final rule, in accordance with the Administrative Procedure Act. Coordination with other agencies that provide financial

assistance to public broadcasting, or are otherwise interested, would be appropriate to assure that broadcasters are not subjected to inconsistent standards and that this Department has the benefit of the wide range of expertise available. We also intend to explore the desirability of joining with the other agencies in a joint rulemaking proceeding which could not get underway until an interagency agreement has been executed. In sum, for the Department to accomplish the task in a responsible manner it will take some time, and it is possible that a substantial period of time will be required.

7. While the Secretary has not yet determined what procedures to follow in establishing a compliance standard, she has instructed the Office for Civil Rights and the Office of General Counsel to advise her on this issue and both offices are currently working on that assignment.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on this 25th day of October, 1979.

/s/ David S. Tatel
DAVID S. TATEL

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. CV-78-4715 R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.,
PLAINTIFFS

v.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA
d/b/a KCET, ET AL., DEFENDANTS

OPPOSITION OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE TO THE MOTIONS FOR SUMMARY JUDGMENT BY PLAINTIFFS AND THE PUBLIC BROADCASTING DEFENDANTS

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STATEMENT OF THE CASE

A. *Introduction*

This case involves the application of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to public broadcasting. Plaintiffs assert that public television is financed in large part by federal funds and is therefore subject to section 504. Section 504 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . ."

Plaintiffs' complaint was filed in December, 1978. Defendant KCET's motion to stay this case pending the Supreme Court's decision in *Southeastern Community College* v. *Davis* was denied, as were subsequent motions to dismiss filed on behalf of the federal defendants and the State defendant. The case has been certified as a class action on behalf of the hearing impaired persons within the viewing area of defendant KCET.

Cross motions for summary judgment have now been filed by plaintiffs, the public broadcasting defendants (KCET, the Los Angeles public television station, the Corporation for Public Broadcasting, and the Public Broadcasting Service), defendant Federal Communications Commission, and defendant California Public Broadcasting Commission. Plaintiffs' motion for summary judgment seeks a ruling that section 504 applies to public broadcasting and requires captioning of public television programs. The defendant Secretary of the Department of Health, Education and Welfare agrees with plaintiffs that section 504 is applicable to public television, but opposes plaintiffs' motion for summary judgment on the ground that numerous unresolved factual issues preclude determination at this time of a section 504 compliance standard for public television. The Secretary respectfully requests that the Court permit the Department of Health,

Education and Welfare, in coordination with other federal agencies that fund and regulate public television, to establish a compliance standard that states public television's obligation to the hearing impaired. The attached declaration of David S. Tatel, Director of HEW's Office of Civil Rights, documents the Department's commitment to proceed with establishing a compliance standard in this area.

B. *Arguments of the Public Broadcasting Defendants*

The public broadcasting defendants in their joint motion for summary judgment argue, alternatively and in this order: section 504 does not require affirmative action, and if it does, they are already doing enough to provide the hearing impaired access to their programs; in any case, they assert, section 504 does not apply to public broadcasting because of section 398 of the Public Broadcasting Act, 47 U.S.C. § 398, and the First Amendment; moreover, they argue, section 504 does not give rise to a private right of action, plaintiffs have not exhausted their administrative remedy before the Department of Health, Education and Welfare, and, as a final line of argument, if section 504 does require affirmative compliance on the part of public broadcasters, the court should defer to the primary jurisdiction of the Federal Communications Commission to establish compliance standards.

C. *Position of the Department of Health, Education and Welfare*

As noted above, it is the position of the Secretary of the Department of Health, Education and Welfare that public broadcasting is subject to section 504. The Secretary believes that neither the Public Broadcasting Act, nor the First Amendment, bars application of section 504 to public broadcasting as contended by defendants KCET, CPB and PBS. As will be developed in the first section of the Department's argument below, *infra* at 5-16, the Department of HEW, in coordination with other federal

departments and agencies that provide federal financial assistance to or regulate public television, is the appropriate body to establish a compliance standard under section 504 for public television. The Department has developed considerable expertise in establishing compliance standards under section 504 in other important areas, e.g., physical access to educational and transportation facilities. It has been designated the lead federal agency for coordination of enforcement of section 504 by Executive Order 11914. The Supreme Court has recognized HEW's primary responsibility for establishing compliance standards in those instances in which it is determined that section 504 requires action be taken to eliminate discrimination against the handicapped by federally-assisted programs. *Southeastern Community College* v. *Davis*, 99 S.Ct. 2361, 2370 (1979). The Department also has considerable expertise with the technical matters related to making television accessible by virtue of its efforts over the last decade to caption television for the hearing impaired.

The Department's position, accordingly, also dictates opposition to the motion for summary judgment of the public broadcasting defendants. The Department disputes their argument that application of section 504 to public television is barred by the Public Broadcasting Act, 47 U.S.C. § 398, and the First Amendment. As noted above, the Secretary believes that a compliance standard may be established that respects the responsibility of the public broadcasters for program content while requiring at the same time, to the extent possible, that programming be accessible to the deaf and hearing impaired.

The Secretary also rejects the argument of the public broadcasting defendants that interprets the Supreme Court's opinion in *Southeastern Community College* v. *Davis*, *supra*, to hold that section 504 imposes no obligations on recipients of federal funds. Memorandum in support of motion for summary judgment of defendants KCET, CPB, and PBS (KCET/CPB/PBS Memo.) at 23-27.

II. ARGUMENT

In this memorandum, the Department will argue that (1) this Court should defer to the Department and other affected federal agencies to establish a section 504 compliance standard for public television; (2) section 504 applies to public television; and (3) the Supreme Court's decision in *Southeastern Community College* v. *Davis*, *supra*, does not bar requirements that federally-assisted programs take positive steps to eliminate discrimination against the handicapped.

A. *This Court Should Permit HEW To Establish Compliance Standards And Obtain Compliance*

Although the Secretary agrees with plaintiffs' assertion that section 504 creates an obligation to the hearing impaired on the part of public television, she opposes plaintiffs' demand that this Court establish a compliance standard that requires open captioning of all programs. The Secretary respectfully requests that the Court deter to the Department* and the other federal agencies that

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* With respect to the arguments of the public broadcasting defendants that section 504 creates no private right of action and, that plaintiffs have not exhausted their administrative remedies before HEW, it is the position of the Department of Health, Education and Welfare that section 504 does create a private right of action. The Supreme Court in *Cannon* v. *University of Chicago*, 99 S.Ct. 1946 (1979), held that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, creates a private right of action, and the Court's opinion in *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, implicitly accepted the notion of such a right by ruling for Bakke on the basis of Title VI. Section 504, as noted below, *infra* at 28, was patterned on the nondiscrimination provisions of Titles VI and IX. The Supreme Court's opinions acknowledging private rights of action under Titles VI and IX dictate a similar conclusion with respect to section 504. The Court in *Davis* case explicitly declined to state its views on the private right of action issue, 99 S.Ct. at 2366, n.5, and its decision on the merits in that case provides no support for the conclusion that section 504 does not create such a right.

The Department also disputes the contentions of the broadcast defendants that a private suit under section 504 against a recipient

fund and regulate public television and permit them to consider the unanswered, complex questions that must be resolved before any standard of compliance can be formulated. See attached Declaration of David S. Tatel, Director, Office of Civil Rights, Department of Health, Education and Welfare.

Determination of a compliance standard will require consideration of the following sorts of questions. What are the existing alternatives for providing access and their impact on the service provided by public television? What would be required of local stations? How much of their programming is local in origination and how much is produced through cooperative efforts of the stations that

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of federal funds must be preceded by exhaustion of administrative remedies. If under section 504 a plaintiff sues only a recipient of federal financial assistance for an injunction prohibiting discrimination, the recipient may not defend by arguing that the plaintiff has failed to exhaust administrative remedies.

The administrative remedy would be to invoke the fund termination procedure authorized by Title VI and made applicable to section 504 by section 505(a)(2) of the Rehabilitation Act of 1973, as amended by the Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2955. The fund termination procedure is not designed primarily to redress individual grievances of persons who have been subjected to illegal discrimination in federally funded programs. While it is true that such persons may trigger an administrative investigation by filing a complaint with the appropriate funding agency, they may not participate as parties in the investigation or in subsequent enforcement proceedings. A voluntary compliance agreement between the agency and the recipient of funds need not include relief for the specific benefit of the original complainant. In short, an exhaustion requirement is inappropriate because the private plaintiff seeking individual relief has no administrative remedy to exhaust. See 45 C.F.R. Parts 80 and 81, *passim*.

With respect to the public broadcasting defendants' request that this Court defer to the primary jurisdiction of the Federal Communications Commission, the Department notes that the Commission has specifically stated in its two decisions on plaintiffs' claims before it that HEW is the appropriate body to determine whether a public television station has violated section 504 with respect to the hearing impaired.

would permit the sharing of costs related to providing access to the hearing impaired? The compliance standard must also be based on a review of the technical feasibility of providing access to various sorts of programs. For example, what means are available to permit hearing-impaired persons to understand the aural track of different sorts of "live" programs, e.g., news, interview and discussion programs? Is the captioning of programs produced on film possible? What is the availability of trained personnel to caption or sign programs? Are there in the short run sufficient persons trained in this work to staff both national production entities and local stations? What are the availability in the short run and the cost of the equipment necessary for captioning? What impact would various compliance standards have on the goal of increasing locally-originated programming? These and other questions must be considered and resolved.

Agency determination of the parameters of public television's obligation to the hearing impaired is essentially the relief sought by plaintiffs. In their motion for summary judgment, plaintiffs seek an injunction requiring HEW "to issue an appropriate policy statement and process the complaint against KCET." Pl. Brief at 165. The Secretary has now made the fundamental policy decision. She has determined that section 504 applies to public television and has directed the Office for Civil Rights to develop a compliance standard. Processing of the administrative complaint against KCET requires that a compliance standard be established. Permitting the Department and other federal agencies to establish the following reasons.

First, policy in this area requires coordination. A number of federal agencies provide federal financial assistance to public television. HEW provides the broadcast rights to the programs produced with its funds. The National Telecommunications and Information Administration in the Department of Commerce provides the facilities grants previously administered by HEW. In addition, a number

of other agencies provide loans and grants to groups involved with television. Under Executive Order 11914, each of these agencies is obligated to issue regulations implementing section 504. Section 2 of Executive Order 11914, Attachment D to this memorandum. Section 1 of the Executive Order designates the Secretary of Health, Education and Welfare to coordinate the implementation of section 504 by all federal agencies that provide federal financial assistance. Because of the large number of agencies involved in funding public television coordination is particularly important. Establishing a coordinated section 504 compliance standard for public television can be accomplished through the Department and the Office for Civil Rights (OCR) pursuant to its responsibilities under the Executive Order.

Second, the Department and the Office of Civil Rights have considerable expertise in establishing compliance standards under section 504. In addition to publishing regulations dealing with many of the programs the Department funds itself, 45 C.F.R. Part 84 (1977), and regulations establishing standards for the 504 regulations of all other federal agencies, 45 C.F.R. Part 85, 43 Fed. Reg. 2132 (1978), the Department and the Office for Civil Rights have prepared voluminous materials interpreting the requirements of 504. For example, the Department publishes its 504 policy interpretations in the Federal Register, see e.g., "Program Accessibility" Requirements, 43 Fed. Reg. 36034 (1978); Carrying Handicapped Persons To Achieve Program Accessibility, 43 Fed. Reg. 36035 (1978); Participation of Handicapped Students in Contact Sports, 43 Fed. Reg. 36035 (1978). The Office of Standards, Policy and Research in OCR publishes a bi-monthly Policy Digest that reviews decisions under section 504, Title VI and Title IX. The Policy Digest covers such topics as the financial obligation of persons residing in state institutions to pay for their own support. OCR has prepared explanatory materials advising recipients of their obligations under section

504, e.g., Recruitment, Admissions, and Handicapped Students: A Guide for Compliance with Section 504 of the Rehabilitation Act (April 1978); Civil Rights, Handicapped Persons, and Education: Section 504 Self-Evaluation Guide for Preschool, Elementary and Secondary Education (August 1978); Section 504 Self-Evaluation for Colleges and Universities (1978). The Department is soon to issue a 350-page manual entitled "A Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973" that will analyze in detail all policy determinations made thus far under section 504.

Perhaps most importantly, staff of the Office of the General Counsel of the Department who work with OCR are assigned to each agency of the federal government for the purpose of developing and coordinating issuance of 504 regulations. The regulations issued by the Department of Transportation on the accessibility of mass transportation systems, 44 Fed. Reg. 31442 (May 31, 1979), are a good example of the result of a coordinated effort between HEW and another federal department. The HEW coordinating effort has resulted in a concentration in OCR of expertise in section 504 compliance matters as was intended by the Executive Order.

This expertise permits OCR to provide consistent answers to questions that recur in establishing 504 compliance standards. For example, how are cost factors to be handled? Is there any difference between the scope of the obligation of large and small federally-financed programs?

The expertise of the Office for Civil Rights, which bears principal responsibility for 504 policy coordination, will in this particular instance be supplemented by the years of expertise in the Department with captioning of films and television for the deaf.

Third, a uniform national compliance standard is needed. Policy in this area should not be established solely on the basis of the facts pertaining to KCET, one

of the largest, most established stations in the country. A compliance standard must take into account the differing circumstances of stations of varying sizes and organization all across the country.

These three reasons—the need for coordination of the different agencies with authority to establish standards in this area, the Department's expertise in section 504, and the need for national compliance standards—are the traditional reasons given by courts choosing to defer to the primary jurisdiction of agencies. The traditional doctrine of primary jurisdiction is grounded on two basic rationales: the need for uniformity of regulation and the need for initial consideration by a body with specialized knowledge. *Tex. & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *United States* v. *Western Pac. Ry. Co.*, 352 U.S. 59, 63-64 (1956); *United States* v. *Radio Corp. of America*, 358 U.S. 334, 346-52 (1959); *Kappelmann* v. *Delta Air Lines, Inc.*, 539 F.2d 165, 168-74 (D.C. Cir. 1976); and *Home Federal Savings and Loan Ass'n.* v. *Insurance Department of Iowa*, 428 F. Supp. 992 (N.D. Iowa 1977). See also 3 K. Davis, Administrative Law Treatise §§ 19.01 and 19.09 (1958).

As noted by the Supreme Court in *United States* v. *Western Pacific Ry., supra*, 352 U.S. at 64:

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

The purposes served by the doctrine of primary jurisdiction will be served by its application in this case. Plaintiffs seek a resolution by the government of public television's obligation to the hearing impaired under section 504. That their purpose is not simply an adjudication of station KCET's obligation is evident from the inclusion of the Department of Health, Education and Welfare, the

Federal Communications Commission, the Corporation for Public Broadcasting, the Public Broadcasting Service, and the California Public Broadcasting Commission as defendants. The relief sought by plaintiffs, the national resolution of the issue posed by their complaint, can best be accomplished by the Department and the other affected federal agencies.

The appropriateness of permitting the compliance standard to be established on the national level in this case is supported by a reading of the opinion of the Court of Appeals for the District of Columbia Circuit in *Kappelmann* v. *Delta Air Lines, Inc., supra.* That case involved the issue of regulation of the transportation of radioactive materials on commercial airlines. The plaintiff had been exposed to radiation leaking from an improperly shielded container carried in the cargo section of a Delta Air Lines flight from Washington to Atlanta. He sued for damages and injunctive relief. The defendants included the airline, the shipper, the Department of Transportation, the Civil Aeronautics Board, and the Federal Aviation Administration. The district court dismissed the request for injunctive relief chiefly on the ground that the doctrine of primary jurisdiction required that the issue be first presented to the appropriate administrative agency.

The District of Columbia Circuit held that although the facts of the case did not necessarily fit the traditional doctrine of primary jurisdiction, something "in the nature of primary jurisdiction" was appropriate. The Court noted that the plaintiff was "seeking a broad form of relief which amounts to legislation by injunction, initially limited to one carrier but expected and intended to have sweeping effects on the entire industry." 539 F.2d at 169. The Court reviewed the legislative history of the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-12, Pub. L. No. 93-633, 88 Stat. 2156 (1975), its stated intent to provide a national solution to the problem by preemption of a multiplicity of State and local laws in the area, and the function and activities of the Materials Trans-

portation Bureau in the Department of Transportation. The Court determined that the federal agencies responsible for the problem posed by plaintiff's lawsuit were better suited to finding an appropriate solution.

This is also true in the case of the problem posed by plaintiffs in the case at bar. Deference to the primary jurisdiction of the federal agencies will permit this Court to benefit from the Department's section 504 expertise and will also permit a uniform national solution to be established. If, at the end of the administrative process, review of the compliance standard is sought, this Court will have a better basis for ruling than would be the case in the absence of agency action.

Plaintiffs have faulted the Department for its lack of enforcement of section 504. But in the area of providing access to television to the hearing impaired, the Department has made substantial efforts to provide a solution to the problem raised by plaintiffs' 504 complaint. The government's closed captioning project predated the passage of section 504, see HEW Answers to Plaintiffs' Interrogatories, Answer No. 14, and has never been predicated on the nondiscrimination provision. But the government's past efforts to provide a solution to the problem justify a conclusion by the Court that, having made the policy decision that section 504 requires action by public broadcasters to eliminate discrimination, the Department will now in good faith proceed to establish a compliance standard.

Another indication of the Department's good faith with respect to enforcement of section 504 in public television is the fact that it has now taken steps to ensure that all television programs produced under contract with the Department will in the future be closed captioned. See HEW Answers to Plaintiffs' Interrogatories, Answer No. 9. In addition, the Department is making efforts to have its programs available for re-runs captioned.

Similarly, the history of the public broadcast defendants' involvement with the closed captioning project indi-

cates that voluntary compliance with a reasonable compliance standard can be expected from these defendants. Their legal position in this Court is predicated on their view of the nature of public broadcasting, not an intransigent refusal to include the hearing impaired.

Finally, in amending section 504 to incorporate the Title VI enforcement procedures, Congress indicated its preference when possible for voluntary compliance with the nondiscrimination provision. See section 602 of Title VI, 42 U.S.C. § 2000d-1. The affected federal agencies should be permitted to establish a compliance standard for public television and to obtain compliance.

B. *Section 504 Applies To Public Broadcasting*

In their joint motion for summary judgment, defendants KCET, CPB and PBS argue that section 504 is not applicable to public broadcasting. Their argument is based on section 398 of the Public Broadcasting Act, 47 U.S.C. § 398, and the First Amendment. It is the position of the Department of Health, Education and Welfare that neither the Public Broadcasting Act, nor the First Amendment, bars absolutely the application of section 504 to public broadcasting. The Department believes that a section 504 compliance standard can be drafted that is consistent with the Public Broadcasting Act and the First Amendment.

1. *Application of section 504 is not barred by section 398 of the Communications Act*

Section 398 provides in pertinent part:

> *Nothing contained in this part* shall be deemed (1) to amend any other provision of, or requirement under, this Act; or (2) except to the extent authorized in subsection (b) [equal employment provision], to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over public telecommunications, or over the Corporation or any of its grantees or contractors. . . .

47 U.S.C. § 398(a), amended by the Public Telecommunications Financing Act of 1978, Pub. L. No. 95-567, § 309, 92 Stat. 2405 (emphasis added). This section does not and was not intended by Congress to exempt public broadcasting from the application of federal civil rights laws.

a. *The language of section 398 is no bar*

The explicit language of the section provides that "[n]othing contained in this part" shall authorize the federal government to exercise control over public broadcasting. That language does not write out of existence federal law applicable to all recipients of federal financial assistance set forth elsewhere. *Cf. Accuracy in Media, Inc.* v. *Federal Communications Commission*, 521 F.2d 288, 295-96 (D.C. Cir. 1975) (section 398's prohibition against government interference based on authorizations "in this part" does not preclude regulation based on provisions outside of the Public Broadcasting Act, 47 U.S.C. § 390-99). "[T]his part" refers to Part IV, Chapter 5 of the Communications Act of 1934, Subchapter III,* 47 U.S.C. §§ 390-399, which authorizes the facilities grant program, establishes the Corporation for Public Broadcasting, and provides for its funding and the distribution of those funds to public broadcasters. The "short title" of Part IV is the Public Broadcasting Act of 1967. Section 398 establishes that Congress, in creating the Corporation for Public Broadcasting and providing federal funds to public broadcasting, did not intend to create a federal broadcasting agency, but rather a system of noncommercial stations supported in large part with government funds, but operating independently. The legislative history

* The Communications Act is divided into six chapters; Chapter 5 contains the bulk of the Act, includes the provisions establishing the Federal Communications Commission, and pertains to all the media of communication regulated by the FCC: Subchapter III pertains to the broadcast media, principally radio and televisions; and Part IV of Subchapter III applies to noncommercial broadcasting.

makes clear that Congress enacted section 398 to protect the *content of* programming of public broadcasters from government interference, but not to exempt public broadcasting from the civil rights laws. For a discussion of the legislative history of section 398, see *infra* at 20-32.

That the language of section 398 does not bar application of the federal civil rights laws codified outside of the Public Broadcasting Act, 47 U.S.C. §§ 390-99, is supported by the Report of the Inter-Agency Task Force on Non-Discrimination in Public Broadcasting (January 1978). The Task Force Report was prepared at the request of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce. Attachment A to this memorandum. The Task Force was convened to advise the Subcommittee on how to improve enforcement of laws prohibiting employment discrimination by public broadcasters. The Task Force addressed itself to the provisions and enforcement of Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* and 2000e *et seq.* Title VI prohibits discrimination based on race, color or national origin in any program or activity receiving federal financial assistance, 42 U.S.C. § 2000d. Title VII makes it an unlawful employment practice for any employer to discriminate against an individual based on race, color, religion, sex or national origin, 42 U.S.C. § 2000e-2. The Task Force was made up of representatives of the Justice Department, the Federal Communications Commission, the Equal Employment Opportunity Commission, and the Department of Health, Education and Welfare.

In considering application of Titles VI and VII to public broadcasting, the Task Force examined as a threshold matter section 398's prohibition against government interference. It concluded that section 398 did not bar application of federal civil rights laws.

> The language of [section 398] seems to prohibit the exercise of control over CPB by a federal entity using the Public Broadcasting Act as authority. It does

not appear, however, to preclude the exercise of direction by a governmental agency acting within the scope of other statutory authority. It may be possible, therefore, for an agency to have some enforcement responsibility over CPB or its grantees if such responsibility is derived from a source other than the Public Broadcasting Act. Therefore, agencies with enforcement obligations under Title VI and VII of the 1964 Civil Rights Act can carry out those requirements without violating the prohibition contained in Section 398.

Report of the Inter-Agency Task Force on Non-Discrimination in Public Broadcasting, *supra*, Attachment A at 6.

b. *The legislative history of section 398 is no bar*

Plainly, the explicit language of section 398 does not bar a requirement based on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Defendants KCET, CPB and PBS argue, however, that the legislative history of the Public Broadcasting Act supports the assertion that Section 398 of the Communications Act bars application of section 504 to public broadcasting. KCET/CPB/PBS Memo. at 38-46. On the contrary, the legislative history of section 398 reflects congressional concern that the federal government not interfere with the *content of programs* broadcast by noncommercial stations. It does not support the proposition that in enacting section 398 Congress intended to exempt public broadcasting from federal civil rights laws. Quite the opposite, it indicates that Congress believes public broadcasters are subject to the civil rights laws.

Section 504 may be applied to public broadcasting in a way that does not interfere with the content of programming. Section 504 cannot involve the federal government in telling public television stations what programs to broadcast. It can require that reasonable efforts be made

to make public television accessible to the deaf and hearing impaired.

The following discussion traces the history of section 398 from its inception in a provision of the 1962 Act which first provided federal funds for public television, through the Public Broadcasting Act of 1967, to the 1978 amendments. This discussion makes clear that section 398 is intended to protect program content from government interference, not to exempt public broadcasting from the civil rights laws.

i. *Educational Television Facilities Act of 1962*

Federal financial assistance for public broadcasting was first authorized by the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, which established the facilities grant program. This program provides government support for broadcast hardware and structural facilities, not for programming. For example, under this program in 1978 defendant KCET received $280,000 that was used to pay a significant part of the cost of the station's new transmitter. HEW's Answers to Plaintiffs' First Interrogatories, Answer No. 4. The 1962 Act contained a prohibition against governmental interference, 47 U.S.C. § 397 (1962), that was included as part of an understanding that "the FCC is not to exercise any control of funds under this program." S.Rep. No. 67, 87th Cong., 2d Sess., at 9 (1961), reprinted in [1962] U.S. Code, Cong. & Admin. News, 1614, 1620. See *Accuracy in Media, Inc.* v. *Federal Communications Commission*, *supra*, 521 F.2d at 293, n. 17. The sparse legislative history of the 1962 Act provides no support for the argument of defendants KCET, CPB and PBS that section 398 bars application of section 504.

ii. *Public Broadcasting Act of 1967*

Similarly, the legislative history of the 1967 Act makes clear that section 398 was intended to protect program

content and not to pre-empt the civil rights statutes. The Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, expanded government support to the programming of public television. The expansion of support to programming intensified congressional concern about government control of speech. The Corporation for Public Broadcasting was explicitly created as a mechanism to insulate the programming of noncommercial stations from government interference. This insulation was intended to keep public broadcasting from becoming a spokesman for the political party in power.

The importance of protecting program content from governmental pressure is reflected in both the House and Senate Reports on the 1967 Act. The Senate Report states:

> There is general agreement that for the time being, Federal financial assistance is required to provide the resources necessary for quality programs. It is also recognized that this assistance should in no way involve the Government in programming or program judgments. An independent entity supported by Federal funds is required to provide programs free of political pressures.
>
> * * * *
>
> Your committee has heard considerable discussion about the fear of Government control or interference in programming if [this bill] is enacted. We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast. As President Johnson said in his message of February 28:
>
> > Noncommercial television and radio in America, even though supported by Federal funds, must be absolutely free from any federal government interference over programming.

S. Rep. No. 222, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code, Cong. & Admin. News, 1772, 1775, 1782. Sim-

ilar concerns are voiced in the House Report, H.R. Rep. No. 572, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code, Cong. & Admin. News 1799, 1810.

Freedom of public broadcasting from political pressures and government control of programming was ensured in the 1967 Act by a variety of means: no more than eight of the Corporation's fifteen-member Board were permitted to be of the same political party (47 U.S.C. § 396(c)(1)); no political test or qualification was to be used in connection with employment by the Corporation (47 U.S.C. § 396(e)(2)); the Corporation was prohibited from contributing to any political party or candidate (47 U.S.C. § 396(f)(1)); the Corporation was prohibited from owning or operating a station or program production facility (47 U.S.C. § 396(g)(3)); the Corporation was prohibited from editorializing or from supporting or opposing any political candidate (47 U.S.C. § 399); and section 397 of the 1962 Act was renumbered section 398 and its prohibition against government interference was expanded to protect the Corporation.

Defendants KCET, CPB and PBS do not deny that the concern of Congress was with governmental interference with *program content.* Indeed, throughout their argument that section 398 bars application of section 504 to public broadcasting they refer only to congressional concern with interference with program content. See KCET/CPB/PBS Memo. at 38-46. It is only in the paragraph summarizing and concluding this portion of their argument that they attempt to expand the congressional concern for program content to prohibit government regulation of *any* of public broadcasting's *"activities." Id.*, at 46.

Defendants KCET, CPB and PBS attempt to characterize a requirement of access as interference with program content. The Department of Health, Education and Welfare rejects the contention that a compliance standard must necessarily interfere with program content. A general framework for measuring whether public broad-

casters have taken sufficient steps to permit the hearing impaired to enjoy the benefits of public television that leaves program choice and direction of programming to the discretion of broadcasters will not interfere with program content.

iii. *Public Telecommunications Financing Act of 1978*

The legislative history of the Public Telecommunications Financing Act of 1978 also provides persuasive support for the proposition that section 398 is no bar to application of the federal civil rights laws to public broadcasting. The 1978 Act amended the Public Broadcasting Act of 1937, 47 U.S.C. §§ 390-99. It shows that the federal agencies designated by Congress to enforce these laws have consistently taken the position that the laws are applicable to public broadcasting. A report issued by the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce after its 1976 oversight hearings on enforcement of anti-discrimination laws in public broadcasting indicates that Congress believes the civil rights laws are applicable as long as these laws are not used to dictate the content of programming. Indeed, the 1976 oversight hearings and the legislative history of the 1978 Act's amendments to section 398 with respect to employment discrimination reveal that CPB and PBS themselves took the position before Congress that public broadcasters are subject to the federal civil rights laws.

In testimony and written submissions during the Subcommittee's 1976 oversight hearings, CPB and PBS officials did not argue that section 398 bars as a threshold matter application of the civil rights laws to public broadcasting. They simply cautioned that the First Amendment prohibited improper enforcement of the civil rights laws to dictate program content. Henry Loomis, then President of CPB, made the following remarks before the Subcommittee during its oversight hearing:

The first thing that I would like to stress, Mr. Chairman, is that CPB unequivocally supports all compliance with and enforcement of all equal opportunity laws and regulations throughout public broadcasting. There are times people question whether we are really supportive and I can assure you that the CPB Board of Directors has been crystal clear in a series of resolutions over the last several years that demonstrate its wholehearted support of the goals of civil rights and equal opportunity.

There is a second area where there is some misunderstanding. CPB itself, is clearly subject to the provisions of title VII, because it has more than 15 employees and title VI, Executive Order 11246 . . ., and title IX of the Education Amendments of 1972.

Sometimes it is alleged that we state that we ourselves are not subject to these laws, and that is not the case. The Corporation is subject, there is no question on that.

* * * *

Another misconception is that the stations or licensees are only subject to EEO laws if CPB enforces them. This is not the case. Virtually all of them are subject to title VII. . . . Most of them are covered by titles VI and IX because they have received HEW grants either as educational institutions or under the facilities program. So that virtually all of these licensees are covered by the appropriate Government departments.

Enforcement of Equal Employment Opportunity and Anti-discrimination Laws in Public Broadcasting: Hearings before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 17-20 (Comm. Print No. 94-139) (statement of Henry Loomis).

The President of the Public Broadcasting System, Lawrence K. Grossman, made similar statements during

the 1976 hearings. *Id.*, at 85-87. The point of his testimony was that existing federal civil rights laws, Titles VI and VII of the Civil Rights Act and Title IX of the Education Amendments of 1972, apply to public broadcasters, and that no new legislation, only enforcement by agencies empowered by existing legislation, was needed to ensure that "local and national program services . . . reflect the full diversity of American life. . . ." *Id.*, at 88-90. Mr. Grossman submitted for the record a memorandum of law prepared by PBS that documents the coverage of existing civil rights laws. *Id.*, at 97-128.

Section 504's prohibition of discrimination against the handicapped was patterned on the prohibitions against discrimination in Title VI and Title IX. S. Rep. No. 93-1297, 93rd Cong., 2nd Sess. 39-40, reprinted in [1974] U.S. Code Cong. & Admin. News, 6373, 6390 (1974). S. Rep. No. 890, 95th Cong., 2nd Sess. (1978). All three prohibit discrimination in federally-funded programs. There is no basis to assume that Title VI and Title IX apply to public broadcasting, but section 504 does not.

Representatives of various federal agencies also testified as to the applicability of the civil rights laws to public broadcasting during the Subcommittee's oversight hearings. *Id.*, at 72-85 (statement of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division); at 143-154 (statement of Martin H. Gerry, Director, Office of Civil Rights, Department of Health, Education and Welfare); at 155-254 (statement of Richard E. Wiley, Chairman, Federal Communications Commission); and at 254-62 (statement of Ethel B. Walsh, Vice Chairman, Equal Employment Opportunities Commission). The then director of HEW's Office of Civil Rights, Martin H. Gerry, told the Subcommittee that the Department believed that the full range of civil rights laws, *including section 504 of the Rehabilitation Act of 1973*, is applicable to public broadcasters receiving federal financial assistance. *Id.* at 143. No member of the Subcommittee questioned this statement.

Following its oversight hearings, the Subcommittee issued a report that makes clear it believes public broadcasters are subject to the civil rights laws. Summary of Findings and Recommendations on the Enforcement of Equal Opportunity and Anti-discrimination Laws in Public Broadcasting: Report of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (Comm. Print 95-12), Attachment B to this memorandum. The report concluded that questions about responsibility for enforcement resulted in inadequate enforcement of existing civil rights laws. The Subcommittee recommended that the Justice Department convene an interagency task force to consider amendments to the Public Broadcasting Act to clarify the obligations of public broadcaster with respect to equal employment. *Id.*, at 6.

The Interagency Task Force convened at the request of the Subcommittee also concluded that the civil rights laws are applicable to public broadcasting and specifically stated that section 398 of the Public Broadcasting Act does not pose a bar to application. See discussion *supra* at 19-20, Attachment A at 6.

The 1976 oversight hearings of the House Communications Subcommittee, the Report of the Subcommittee, and the Task Force Report belie any conclusion that section 398 was intended to pre-empt the civil rights laws with respect to public broadcasting. The prime focus of this legislative activity was the employment practices of public broadcasters, but in addressing the employment issue all concerned considered the full range of civil rights laws.

The foregoing legislative activity resulted in the amendment of section 398 to include the current equal employment provisions, 47 U.S.C. § 398(b), Pub. L. No. 95-567, 92 Stat. 2405, § 309 (1978). This provision prohibits employment discrimination in public broadcasting, designates the Secretary of HEW to enforce the prohibition, and gives the Corporation for Public Broadcasting respon-

sibility for monitoring employment practices of public broadcasters.

An Administration spokesman testifying before the House Subcommittee during its deliberations on the 1978 Act stated that the Administration version of the bill was intended to *restate* the existing obligations of broadcasters under the civil rights laws. Public Broadcasting Financing Act of 1978: Hearings before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 117 (statement of Henry Geller, Assistant Secretary Designate, National Telecommunications and Information Administration, Department of Commerce). In his opening remarks, the Chairman of the Subcommittee, Congressman Van Deerlin, the author of the bill that became the 1978 Act, stated that his version was intended to build on and strengthen the Administration bill. *Id.*, at 2. Congressman Van Deerlin, who is a strong supporter of the journalistic independence of public broadcasters in matters of program content, did not at any time during the Subcommittee hearings on the Act indicate that he disagreed with the proposition that the civil rights laws are applicable to public broadcasting as long as their application does not result in government interference with program content.

Similarly, officials of CPB and PBS appearing before the House Subcommittee during consideration of the 1978 Act testified along the same lines as they had during the 1976 oversight hearings. Their testimony indicates their acceptance of the fact that the civil rights laws apply to public broadcasting. *Id.*, at 424-539, in particular at 453 (statement of Henry Loomis, President of CPB); 649-756 (statements of Ralph B. Rogers, Chairman of PBS, Newton N. Minow, Chairman-Designate, and Lawrence K. Grossman, President of PBS). The written submission of the Public Broadcasting Service to the Subcommittee states that "[t]here is absolutely no question about public broadcasting's obligation to comply with the na-

tion's civil rights laws with regard to employment and all other activities. . . ." *Id.*, at 691.

In summary, neither the explicit language of section 398, nor the legislative history of the Public Broadcasting Act, support the argument that section 504 is inapplicable to public television. Section 504 can be applied to public television as long as its application does not interfere with broadcaster control over program content.

2. *Application of section 504 is not barred by the First Amendment*

The argument of defendants KCET, CPB and PBS that the First Amendment bars application of section 504 to public broadcasting is very similar to their statutory argument. Their constitutional argument also turns on their assertion that a requirement of accessibility for the hearing impaired would constitute impermissible government regulation of program content or speech. As noted throughout, the Department does not agree that such a requirement would necessarily interfere with program content. The government would not be telling public broadcasters what programs to show as is asserted by the broadcast defendants. KCET/CPB/PBS memo. at 64. A section 504 compliance standard could be established that would not violate the First Amendment's prohibition against government regulation of speech.

The cases cited by the broadcast defendants do not support their assertion that the First Amendment bars a requirement under section 504 that public broadcasters make their programs reasonably accessible to the hearing impaired. In the cases cited by defendants, the courts have either struck down government regulation that affects the content of programming or rejected efforts of individuals and organizations to command access to the broadcast media and thus affect the content of programming. While these cases establish that the First Amendment protects the *content* of broadcast programming, they do

not stand for the proposition that a requirement of accessibility for the hearing impaired that is content neutral violates the First Amendment.

For example, in support of their constitutional argument the broadcast defendants place principal reliance on *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (*en banc*), and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). In the *Community-Service* case, the District of Columbia Circuit struck down a statutory provision and implementing regulations that required public broadcasters to make, retain, and provide on request audio recordings of programs on issues of public importance. After noting that the provision was not on its face content neutral in that it applied only to programs on important public issues, 593 F.2d at 1111-12, the Court examined the legislative history of the recording requirement and found that it was intended "to impose the threat of congressional or governmental control over the content of noncommercial public affairs broadcasting. . . ." *Id.*, at 1112-14. The Court held this purpose violated the First Amendment.

Similarly, the Supreme Court opinion in *CBS* v. *DNC*, *supra*, indicates that the First Amendment protects against governmental regulation of program content, not against any and all regulation of broadcasting. That case concerned the right of individuals and organizations to purchase commercial broadcast time to solicit political support or espouse points of view on controversial issues of public import. In rejecting the contention of the United States Court of Appeals for the District of Columbia Circuit that the Federal Communications Commission could fashion regulations that would control access of persons seeking to express their points of view, the Supreme Court stated that such regulation would pose "the risk of an enlargement of Government control over the content of broadcast discussion of public issues." 412 U.S. at 126. But a government requirement that public broadcasters

take steps to make their programs accessible to the hearing impaired need not involve government control of the *content* of public television.

In summary, the cases cited by the public broadcasting defendants do not support the conclusion that a section 504 compliance standard for public television will necessarily violate the First Amendment's prohibition against government interference with program content. Thus, it has been established that section 504 may be applied to public broadcasting in such a way as not to violate either section 398 of the Public Broadcasting Act or the First Amendment.

C. *The* Davis *Case Does Not Preclude Requirements of Compliance With Section 504*

Having established that section 504 is applicable to public broadcasting, it is appropriate next to address the argument of defendants KCET, CPB and PBS that the Supreme Court's opinion in *Southeastern Community College* v. *Davis, supra,* holds that section 504 imposes no obligation to take steps to eliminate discrimination on recipients of federal funds. KCET/CPB/PBS Memo. at 23-27. The public broadcasting defendants assert that because the Court in *Davis* held that Southeastern Community College was not required to make modifications in its nursing program that would permit a woman with a serious hearing impairment to pursue a nursing degree, it follows that in no instance is a recipient of federal financial assistance required to take positive steps to eliminate discrimination and to permit handicapped persons to enjoy the benefits of a federally-funded program.

The Court's opinion in *Davis* supports no such assertion. To the contrary, the Court in *Davis* indicates that recipients of federal funds are required by section 504's prohibition against discrimination to make those modifications in their programs that are necessary to meet the needs of handicapped persons, but that will not change

the programs' essential character. The *Davis* opinion makes clear that the modifications that would have been required in the College's nursing program to permit participation by Mrs. Davis went beyond what was required by section 504. The Court found that Mrs. Davis' participation in the nursing program would have necessitated either the elimination of the essential clinical portion of the program or continuous individual faculty supervision. The Court held that the College was not obligated by section 504 or HEW regulations to make such a basic change in its academic program.

The public broadcasting defendants quote the following language from *Davis* in support of their assertion that section 504 creates no obligation for any modifications to be made by any recipient of federal financial assistance:

> [N]either the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so.

99 S.Ct. at 2369-70 (footnote omitted), cited in KCET/CPB/PBS Memo. at 25-26. This holding, however, does not preclude the conclusion that those recipients, who can make modifications that will permit participation by the handicapped without altering the essential nature of their programs, will be required to take such steps.

Moreover, in the very next paragraph the Court goes on to make clear that in some situations positive steps to eliminate discrimination will be required.

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past . . . practices might arbitrarily deprive . . . handicapped persons of the opportunity to participate in a covered pro-

> gram. Technological advances can be expected to enhance opportunities [for participation.] Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a [recipient.] Thus situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accomodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

99 S.Ct. at 2370.

Several conclusions are implicit in the Secretary's determination that section 504 applies to public television and that a compliance standard should be established. First, the technology of television is such that some modifications may be made without altering the essential service provided by public broadcasters, and, second, to fail to make such modifications to permit the hearing impaired to enjoy the benefits of public television would be unreasonable and discriminatory. In establishing a compliance standard the Department will set forth the nature of the modifications required of public broadcasters in order to avoid discriminating against the deaf and hearing impaired. How, within a range of permissible alternatives, broadcasters act to eliminate discrimination will be left to broadcasters themselves. It should again be noted that necessary modifications will not require HEW or any other federal department or agency that provides federal financial assistance to or regulates public television to tell broadcasters what programs to show or what to say about any given topic. Modifications for access will require only that public television programming, to the extent possible, be understandable to the deaf and hearing impaired.

Also implicit in the Secretary's decision that a section 504 compliance standard should be developed is the con-

clusion that hearing impaired persons are "otherwise qualified" to enjoy the benefits of public television. The public broadcasting defendants take a contrary position and argue that the hearing impaired are not "otherwise qualified." KCET/CPB/PBS Memo. at 28-31. In support of this argument, these defendants place primary reliance on language in the *Davis* opinion that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." 99 S.Ct. at 2367. This language, they say, precludes a requirement that any modifications be made in the presentation of public television because hearing impaired persons cannot enjoy television in spite of their handicap because they cannot hear the aural track.

The "otherwise qualified" argument of the defendants is merely a restatement of their argument that *Davis* holds that section 504 in no case requires recipients of federal financial assistance to take positive steps to eliminate discrimination against the handicapped. Both arguments fail to reflect the reasoning of the Court in *Davis*. In *Davis*, the Court held that no reasonable modification of the College's nursing program would permit Mrs. Davis to meet the legitimate demands of the curriculum. In this sense, Mrs. Davis was not qualified in spite of her handicap. Hearing impaired persons are, on the other hand, "otherwise qualified" because some modifications of the technical presentation of public television that does not interfere with the essential nature of programming will permit the hearing impaired to enjoy this federally-funded service in spite of their handicap.

The broadcast defendants pose a number of examples that they claim illustrate the "bizarre and illogical consequences" that would follow from a conclusion that hearing impaired persons are otherwise qualified with respect to public television. KCET/CPB/PBS Memo. at 29-30. Without stating any opinion as to the merits of the examples posed, it must be noted that to the extent

that any of these examples represent situations in which it would not be possible to make modifications to permit participation by the handicapped without changing the essential nature of the service or program, then the handicapped would not be "otherwise qualified." For example, with respect to the broadcast defendants' radio example, *if* it were established that no modification could be made that would permit hearing impaired persons to enjoy public radio without changing the essential nature of this exclusively aural medium, then it would follow that with respect to public radio the hearing impaired are not "otherwise qualified."

Furthermore, the broadcast defendants' analysis of the "otherwise qualified" question would render meaningless rights of the handicapped that have been upheld by the courts in other contexts. For example, the courts have upheld the obligation of educational institutions to provide auxiliary aids to permit blind and hearing impaired students to participate in their educational programs. *Camenisch* v. *University of Texas*, No. A-78-CA-061 (W.D. Texas, filed May 17, 1978) (Attachment C to this memorandum); *Crawford* v. *University of North Carolina*, 440 F. Supp. 1047, 1050 (M.D.N.C. 1977). See 45 C.F.R. § 84.44(d) (HEW regulation requiring educational institutions to provide such aids). Similarly, the obligation of mass transportation systems to take reasonable steps to eliminate discrimination against the physically or "mobility" handicapped has been upheld. *Vanko* v. *Finley*, 440 F. Supp. 656 (N.D. Ohio, 1977). See, *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir., 1977). If the public broadcast defendants' interpretation of "otherwise qualified" were correct, then schools would not be required to provide aids necessary to permit blind and deaf students to attend, and the mobility impaired would have no right of access to public buildings or public transportation.

The public defendants' arguments based on the *Davis* case, both the contention that section 504 creates no obligation to eliminate discrimination and the argument with respect to "otherwise qualified," are thus without merit.

III. CONCLUSION

In this memorandum, the Department has argued that establishing a national section 504 compliance standard for public television can best be done by the Department in coordination with other affected federal agencies, that section 504 is applicable to public television, and that positive steps to eliminate discrimination against the hearing impaired in this area are not precluded by the Supreme Court's opinion in the *Davis* case.

The Department urges that this Court rule that section 504 does require public television to make modifications in its presentation that will permit hearing impaired persons to enjoy this federally-funded service. The Department also urges this Court to deny plaintiffs' motion for summary judgment because of the unresolved questions bearing on establishment of a compliance standard. The Court should remand the question of compliance to the Department of Health, Education and Welfare. The Court may either retain jurisdiction over HEW pending completion of the process of establishing the compliance standard and an administrative ruling on the compliance against defendant KCET, or the Court may dismiss this lawsuit without prejudice to its refiling if plaintiffs wish to seek review of agency action in this area. The motion for summary judgment by the public broadcasting defendants should be denied.

Respectfully submitted,

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Dated: October 25, 1979.

ATTACHMENT A

REPORT OF THE INTER-AGENCY TASK FORCE ON NON-DISCRIMINATION IN PUBLIC BROADCASTING

Submitted to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives

January, 1978

This report reflects the views of the members of the task force and is not necessarily representative of the views of the Executive Branch or of any component thereof.

REPORT OF THE INTER-AGENCY TASK FORCE ON NON-DISCRIMINATION IN PUBLIC BROADCASTING

INTRODUCTION

The Inter-Agency Task Force on Non-Discrimination in Public Broadcasting was convened in June, 1977 in response to a recommendation contained in the "Summary of Findings and Recommendations on the Enforcement of Equal Opportunity and Anti-Discrimination Laws in Public Broadcasting: Report by the Subcommittee on Communications" dated April, 1977. The report called on the Justice Department to "take the lead in convening an interagency task force to examine Federal statutes and their enforcement to develop an adequate program for assuring equal employment opportunity in public broadcasting".[1] The Subcommittee

[1] "Summary of Findings and Recommendations on the Enforcement of Equal Opportunity and Anti-Discrimination Laws in Public Broadcasting: Report by the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-Fifth Congress, First Session, Committee Print 95-12, April 1977", p. 6.

appointed as members of the task force representatives of the Justice Department, the Federal Communications Commission, the Equal Employment Opportunity Commission, and the Department of Health, Education and Welfare. The following individuals participated in the task force:

Joseph Alarid, Attorney, Federal Programs Section, Department of Justice
Sidney R. Bixler, Attorney, Federal Programs Section, Department of Justice
Mary Gallion, Para-Legal Specialist, Federal Programs Section, Department of Justice
Richard J. Shiben, Chief, Renewal and Transfer Division, Federal Communications Commission
Glenn Wolfe, Equal Employment Opportunity Officer, Federal Communications Commission
Issie Jenkins, Deputy General Counsel, Equal Employment Opportunity Commission
Mary Wilson, Attorney, Office of General Counsel, Equal Employment Opportunity Commission
Francesta E. Farmer, Director, Intergovernmental Affairs, Office of Civil Rights, Department of Health, Education and Welfare

On June 16, 1977, the task force met with Chairman Van Deerlin, Representative Mikulski, and the staff of the Subcommittee on Communications to discuss the role of the task force. During that meeting the Subcommittee requested the task force to address itself to five areas of concern:

(1) the adequacy of existing statutes,

(2) the adequacy of existing regulations,

(3) the adequacy of coordination among the agencies,

(4) the adequacy and uniformity of statistical information, and

(5) the appropriate role of the Corporation for Public Broadcasting, the Public Broadcasting Service,

> and the National Public Radio in the area of equal opportunity enforcement.

The Subcommittee requested the task force to examine these areas and in the light of its findings to present realistic alternatives for the Subcommittee to consider as it examines the Corporation for Public Broadcasting during reauthorization hearings in 1978.

In testimony before the Subcommittee on August 9, 1976, J. Stanley Pottinger, Assistant Attorney General for Civil Rights of the Department of Justice, stated:

> If the inquiry is solely about employment for the sake of employment, of course there is nothing which sets the broadcasting industry apart from any other industry, or makes it deserving of the special attention of a committee of Congress. But, if the concern is about employment practices because of what they mean to the interests of minorities and women in receiving the benefits of public broadcasting, then the problem should be addressed directly.

The task force agrees that the objective of public broadcasting should be to serve the varied minority interests and the interests of women as well as the more general interests of the public at large, and toward this end, Congress should encourage the industry to move toward this objective. Equally important, however, is the avoidance of any governmental regulation of program content. The only way which the task force can devise to achieve these two competing objectives is through adequate minority and female interests at all levels of the industry, including the policy making levels of the Corporation for Public Broadcasting. We recom-

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[2] "Statement of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, before the Committee on Interstate and Foreign Commerce Subcommittee on Communications, House of Representatives, concerning Enforcement of Equal Opportunities and Anti-Discrimination Laws in the Public Broadcasting Industry on August 9, 1976", pp. 11-12.

mend at page six, *infra*, that the Public Broadcasting Act be amended to state this objective for CPB board appointments.

In testimony at the same hearings, representatives of the FCC, EEOC, and HEW stated their belief that the public broadcasting industry was subject to existing statutes and regulations, the positions taken by these agencies at that time has not changed. However, as the task force proceeded with its work, it became apparent that because of inadequacies in the language of the statutes and regulations, and perhaps even more importantly a lack of enforcement mechanisms, it is very difficult to ensure that the public broadcasting industry is complying with the spirit of equal opportunity legislation in employment practices that will represent the interests of all segments of society.

On August 17, 1977, the task force met with representatives of concerned citizens' groups and individuals who had produced studies of discrimination in the area of public broadcasting, to obtain various viewpoints on the scope of the existing problems and possible solutions. This meeting was attended by Nolan Bowie, representing the Citizens Communication Center, Helen Franzwa of the U.S. Commission on Civil Rights, Yvonne Price, representing the Southern Christian Leadership Conference, and Caroline Isber and Muriel Canter, co-authors of a study for the Corporation for Public Broadcasting on women in public broadcasting. These individuals advised on a number of areas of concern, centering on oversight and enforcement of existing regulations as well as suggestions for needed changes in present methods of data collection, financing and auditing.

On August 18, 1977, the task force met with representatives of the public broadcasting industry for the purpose of receiving their views on existing policies and possible future steps toward the goal of eliminating discrimination within the industry. The following persons attended:

Dick Seabrook, Corporation for Public Broadcasting,
Carol McCabe, National Public Radio,
Maryanna Dunn, Corporation for Public Broadcasting,
Marcia Wood, Corporation for Public Broadcasting,
Elizabeth Shriver, Public Broadcasting Service, and
Judith Rowe, National Public Radio.

During this meeting the structure of these organizations and their relationships to each other and to their member stations were clarified.

The task force concerned itself primarily with the following statutes:

1. The Communications Act of 1934, as amended,
2. The Public Broadcasting Act of 1967,
3. Title VI of the Civil Rights Act of 1964; and
4. Title VII of the Civil Rights Act of 1964.

The public broadcasting industry is also subject to Title IX of the Education Amendments of 1972 because of funding provided for educational television; however, these funds are administered through HEW and that agency therefore has the responsibility for insuring nondiscriminatory use of the funds.

STATUTES

Communications Act of 1934

The Communications Act of 1934 created the Federal Communications Commission and empowered that agency to license and regulate the broadcast media (47 U.S.C. 151). The FCC may grant a license to an applicant where it is determined that the public interest, convenience, and necessity will be served by such action. The Commission's role in employment nondiscrimination and affirmative action by broadcast licensees—public as well as commercial—is guided by that regulatory mandate from Congress. Over the last decade the FCC has attempted to fashion EEO rules and policies directly related to its particular statutory responsibilities. In

this respect, the Commission's role in EEO matters has been characterized by the United States Supreme Court as a method of ensuring that the broadcast industry's programming fairly reflects the viewpoint of minority groups (*NAACP* v. *Federal Power Commission*, 425 U.S. 662 (1976)). It is the opinion of the task force that the FCC under the Communications Act has sufficient authority to conduct a vigorous EEO program for its licensees; however, it is also the opinion of the task force that the FCC has insufficient funds and personnel to carry out such a vigorous enforcement program.

The FCC's EEO regulations require licensees to refrain from employment discrimination and to engage in affirmative action in their employment policies and practices. Compliance with the EEO rules is monitored primarily by the processing of a licensee's triennial renewal application. Further, each licensee with five or more full-time employees must file an annual employment report, FCC form 395, with the Commission on or before May 31 of each year. This report provides the Commission with a statistical employment profile of each non-exempt licensee. In the public broadcasting sector, 159 television and 161 radio stations are required to file annual employment reports and to submit written EEO programs as part of their renewal applications. 1977 employment data shows that of 9,768 total full-time employees at public stations, 3,222 (33%) are women and 1,242 (12.7%) are minority. According to the Bureau of Labor Statistics, Department of Labor, which uses Census Bureau statistics, the national labor force for these categories (eleven month averages through November, 1977) are 41.0% for women and 16.2% for minorities.

Public Broadcasting Act of 1967

The Public Broadcasting Act of 1967[3] established the Corporation for Public Broadcasting (CPB) as a non-

[3] 47 U.S.C. 390-399.

profit corporation which would not be an agency or establishment of the United States government (47 U.S.C. 396). That section goes on to outline the scope of the Corporation's mandate, composition of its board and its powers and duties. Of particular interest for the purpose of determining the adequacy of this statute in non-discrimination enforcement efforts are existing sections 396(b), 396(c)(1) and (2) and 398. Section 396(b) states that:

> There is authorized to be established a nonprofit corporation, to be known as the "Corporation for Public Broadcasting," which will not be an agency or establishment of the United States Government. The Corporation shall be subject to the provisions of this section, and, to the extent consistent with this section, to the District of Columbia Nonprofit Corporation Act.

The language of this section was adopted in an attempt to put as much distance as possible between CPB and the federal government. As will be discussed further elsewhere, this language causes problems when Title VI enforcement efforts are attempted.

Section 396(c)(1)-(2) states:

> (1) The Corporation shall have a Board of Directors (hereinafter in this section referred to as the "Board"), consisting of fifteen members appointed by the President, by and with the advice and consent of the Senate . . .
>
> (2) The members of the Board (A) shall be selected from among citizens of the United States . . . who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; (B) shall be selected so as to provide as nearly as practicable a broad representation of various regions of the country, various professions and occupations, and various kinds of talent and

> experience appropriate to the functions and responsibilities of the Corporation.

This section, which establishes the Board of Directors and sets its numerical and representational format, may be an area where modification of the statute could assist the further development of a strong commitment on the part of the Board to the elimination of discrimination in public broadcasting. The task force feels that representatives whose concerns are focused on women's and minority issues should serve on the Board of CPB. One way to encourage appointment of individuals who share these special concerns would be to amend this section of the law so as to list among the groups of people identified for participation on the Board citizens whose interest or professional experience has been in the areas of civil rights and work with minority community and women's concerns and programs.

Section 398 states:

> Nothing contained in section 390-399 of this title shall be deemed (1) to amend any other provisions of, or requirement under this chapter; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television broadcasting, or over the Corporation or any of its grantees or contractors, or over the charter of bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

This section is intended to continue the insulation of CPB and its grantees from any interference in its internal affairs by the federal government. The language of this section seems to prohibit the exercise of control over CPB by a federal entity using the Public Broadcasting Act as authority. It does not appear, however,

to preclude the exercise of direction by a governmental agency acting within the scope of other statutory authority. It may be possible, therefore, for an agency to have some enforcement responsibility over CPB or its grantees if such responsibility is derived from a source other than the Public Broadcasting Act. Therefore, agencies with enforcement obligations under Title VI and VII of the 1964 Civil Rights Act can carry out those requirements without violating the prohibition contained in Section 398.

Title VI of the Civil Rights Act of 1964

Under the Public Broadcasting Act of 1967, educational broadcasting stations and licensees receive federal funds from two main sources: One source is capital grants for the construction of facilities. This is provided for in 47 U.S.C. 392(a), and is funded through HEW. The second source is funds "appropriated for payments to" the Corporation for Public Broadcasting (47 U.S.C. 396(k)) for the purposes set forth in subsections (a) and (g) of Section 396. A federal court has described the purpose of the Act as follows: "The Corporation was established as a funding mechanism for virtually all activities of noncommercial broadcasting".[4]

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin in any program or activity receiving federal financial assistance (42 U.S.C. 2000d, *et seq.*). The main prohibition is found in Section 601 of the Act (42 U.S.C. 2000d). The remainder of the Act (Sections 602 through 605, 42 U.S.C. 2000d-1 through d-4) provides for methods of enforcement.

CPB has taken the position that it is not covered by Title VI because it is not a federal agency. However, the structure and the legislative history of Title VI

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[4] *Accuracy in Media, Inc.* v. *F.C.C.*, 521 F.2d 288, 291 (D.C. Cir., 1975).

make it clear that the provisions of the statute were intended to apply to *all* recipients of federal funds. The public broadcasting licensees of CPB were intended to be subject to the provisions of Title VI since they are recipients of federal funding. The floor leader of the bill, Senator Pastore, stated: "The Title [Title VI] has a simple purpose—to eliminate discrimination in federally financed programs." 110 Cong. Rec. 7054 (1964). The wording of Title VI bears this out. Section 601 does not mention the phrase "Federal agency"; it states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (42 U.S.C. 2000d).

Section 602, by contrast, enumerates the powers and responsibilities of Federal agencies and departments in carrying out the mandate of Section 601:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of Section 2000d of this Title . . . (42 U.S.C. 2000d-1)

The legislative history of the Public Broadcasting Act of 1967 further supports the conclusion that CPB is covered. In hearings before the Subcommittee on Communications of the Senate Committee on Commerce [5], then Secretary of HEW John Gardner was questioned about the applicability of the Civil Rights Act of 1964 to the 1967 Act.[6] In its response, HEW, through its General Counsel, Alanson Wilcox, concluded that Title VI

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[5] Hearings on S1160 before the Subcommittee on Communications of the Senate Committee on Commerce, 90th Congress, 1st Session, Volume 7 (1967).

[6] *Id.* at pp. 69-74.

applied to grants under both Title I of the Act (Facilities) and Title II (CPB).[7]

CPB is subject to the provisions of Section 601 because it dispenses financial assistance secured from the general revenues of the Federal treasury. Such grants and contracts constitute federal financial assistance within the meaning of Section 601, and it is the opinion of the task force that CPB is covered by the nondiscrimination provisions of Section 601 (42 U.S.C. 2000d).

There is a further problem with respect to enforcement of Title VI. CPB contends that it is not a federal agency, and therefore, lacks the power and responsibility to enforce Title VI given to federal agencies by Section 602 of Title VI (42 U.S.C. 2000d-1). It is clearly stated in CPB's enabling legislation that the Corporation is "not an agency or establishment of the United States Government" (47 U.S.C. 396(b)). 42 U.S.C. 2000d-1 states that that Section is applicable to "every federal department or agency". For this reason, the Justice Department has taken the position that Section 602 does not apply to CPB.[8] The task force concurs in this view.

Title VI of the Civil Rights Act of 1964 does not authorize action with respect to any employment practice except where a primary objective of the federal financial assistance is to provide employment or where the employment practices within a federally assisted program cause discrimination with respect to beneficiaries or potential beneficiaries of the assisted program. In order, then, for Title VI to reach the problem of employment discrimination, it would have to be shown that employment practices within an individual recipient of federal funds caused discrimination with respect to beneficiaries of the program (see, e.g., 45 C.F.R. 80.3(c)(3) dealing with employment practices in programs receiving federal financial assistance from HEW).

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[7] *Id.* at p. 73.

[8] Statement of J. Stanley Pottinger, August 9, 1976, fn. 2, above.

CPB is a non-profit corporation of the District of Columbia, and has the power to enter into contracts with its grantees. It could incorporate provisions similar to the assurance requirements federal agencies impose on their grantees as a condition of federal assistance (see, for example, 45 C.F.R. 80.41). Since March, 1974, CPB has included equal opportunity terms in its Community Service contracts with local stations. However, there does not seem to be any monitoring of those provisions. Title VI would seem to mandate development of specific monitoring procedures controlled and administered by CPB. In cases where there is statistical or other compelling evidence of noncompliance with Title VI's antidiscrimination mandate, Section 601 seems to suggest, even if Section 602 does not apply to CPB, that CPB could delegate to a federal agency, such as HEW, the responsibility for conducting compliance reviews.[9]

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[9] A March 26, 1975 letter from J. Stanley Pottinger, then the Assistant Attorney General, Civil Rights Division of the Department of Justice, to Thomas G. Gherardi, General Counsel of CPB, reflects his view. Mr. Pottinger stated:

> The Civil Rights Division is of the opinion that Title VI coverage extends to all programs and activities receiving federal financial assistance regardless of the vehicle used to distribute that assistance. Because there is no federal agency or department which funds and supervises CPB programs and activities, we think that CPB is obligated itself to ensure that the provisions of 42 U.S.C. 2000(d) are carried out. We recommend that this be done by requiring that each recipient of CPB financial assistance sign a contractual commitment to comply with Title VI.
>
> In addition to obtaining such commitments we think CPB is required to ascertain whether the recipients of CPB assistance are in fact complying with Title VI. This could be done by having CPB conduct Title VI compliance reviews itself, or by delegating that authority to a federal agency. Because of CPB's limited staff and because persons from the Department of Health, Education and Welfare already conduct Title VI compliance reviews of noncommercial stations receiving federal assistance from HEW, a delegation of authority from CPB to HEW would appear to be an efficient way to monitor compliance with Title VI. Of course the terms of any sort of delegation would have to be agreed to by both CPB and HEW.

Title VII of the Civil Rights Act of 1964

Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e, *et seq.*) makes it an unlawful employment practice for any employer to discriminate against an individual on the basis of race, color, religion, sex or national origin. It is the opinion of the task force that this statute, which is enforced by the Equal Employment Opportunity Commission and the Civil Rights Division of the Department of Justice, and the regulations issued under it, are adequate to cover employment by the majority of public broadcasters. Coverage of Title VII currently extends only to employers with fifteen or more employees, a limitation which would normally exclude many radio and television stations. However, statistics of the FCC indicate that of the 159 public television licenses, 98 are held by universities, schools, or states; and of the 161 public radio licenses, 131 are held by these types of entities. Employees of those stations are employees of those universities, schools or states. Since the total number of employees in the larger entity would be used to determine coverage of a branch of that entity, even under the existing statute the EEOC has probable jurisdiction over the majority of public broadcasters.

COORDINATION

The task force agrees with the findings of the Subcommittee in its April, 1977 report that little or no coordination has existed among the federal agencies responsible for overseeing enforcement of equal opportunity in public broadcasting. However, because of the interest of the Subcommittee in this area, the present state of coordination indicates a significant improvement. In addition to the task force which is clearly a positive step in the direction of closer cooperation, the FCC and EEOC have negotiated a draft Memorandum of Understanding, which is set for each Commission's approval during March, 1978. The highlights of this agreement

are the sharing of information collected by the agencies, the provision of technical advice and guidance by the EEOC to the FCC in their investigation of charges which are outside the jurisdiction of EEOC, referral by the FCC to EEOC and state agencies of charges of discrimination, and notification to the broadcaster by FCC that such referral has occurred. In addition, the agreement provides for coordinated enforcement activity by the EEOC and FCC when there is reasonable cause to believe that discrimination has occurred.

EEOC, the Departments of Justice and Labor and the Civil Service Commission have published for comment "Uniform Guidelines on Employee Selection Procedure", 42 F.R. 65542, December 30, 1977. Previously, there was some ambiguity as to the standards for showing discriminatory practices. When the agencies adopt such uniform guidelines, state and local governments will be expected to meet the standards adopted uniformly by the Federal government.

In addition to these steps toward interagency coordination, the task force feels that further memoranda of understanding and/or joint studies should be undertaken as new areas in public broadcasting EEO enforcement are identified in the future. At the least, these agreements should provide for the sharing and joint use of information and the elimination of duplication of enforcement activities.

STATISTICAL INFORMATION

Most statistical information available on the public broadcasting industry is compiled through the use of the annual employment report, FCC form 395. This form must be filed with the FCC on or before May 31 of each year by each licensee or permitee of a commercially or noncommercially operated standard, FM, television, or international broadcast station with five or more full-time employees. This report provides the Commission with a statistical employment profile of each non-exempt

licensee. The major criticism of the 395 has been that it does not reflect the actual positions and titles used by broadcasters, thus making it difficult to determine at what level women and minorities are being employed by the stations and whether or not these employees are being given the opportunity for upward mobility. Therefore it is felt that the form must be revised so that progress in employment can be accurately measured. The FCC has recently issued a Notice of Inquiry pursuant to modification of the 395 and hopes to issue the modified form during 1978.

The EEOC currently requires a statistical report of all employers who have 100 or more employees. As noted elsewhere, the persons employed in public broadcasting by universities, states, and other entities would in fact be included in the reports of the larger entities. However, a review of current EEO-4, EEO-5, and EEO-6 reports shows that the persons employed in public broadcasting cannot be isolated from those forms because of the broad categories used on the reports. However, it does not appear administratively feasible to adopt a separate category on the reports for public broadcasting employees since the number of persons employed in that field is small. It appears more feasible for EEOC to arrange with the FCC to share the 395 reports obtained by FCC. This is contained in the present draft memorandum of understanding.

ROLE OF CPB, PBS, AND NPR

In its Summary of Findings and Recommendations, the Subcommittee noted that "concern about discrimination in employment in public broadcasting is focused on two levels—first the practices of the national organizations themselves (CPB, PBS, APRS, NPR); and second the practices of individual stations".[10] It is the question, whether the national organizations have affirmative enforcement obligations in regard to their member sta-

[10] "Summary of Findings and Recommendations," p. 1.

tions, which has created many of the EEO problems currently existing in the public broadcasting industry.

The current policy of CPB, as stated in their handout on "Equal Opportunity and CPB Assistance", is to comply fully with all applicable laws and regulations including those which prohibit discrimination, and to require all CPB recipients to comply with these laws and regulations. The document further states that "Because CPB is neither a government agency nor a law enforcement body, it does not have the legal authority to investigate and adjudicate complaints based upon allegedly discriminatory practices by recipients of its assistance." [11] However, it indicates that CPB will refer any complaints which it receives to "a government agency with jurisdiction" and that

> Whenever a court or government agency with jurisdiction shall determine fully that a recipient of assistance from the Corporation is in violation of federal, state, or local laws and regulations prohibiting discrimination on the basis of race, color, religion, age, national origin or sex, and notice of such determination is given in writing to the Corporation by the court, agency, or any other person and officially certified, the Corporation shall promptly notify the recipient that unless the recipient shall demonstrate to the satisfaction of the Corporation within 30 days that the violation has been fully corrected or that the recipient is in full compliance with all remedial provisions of such final determination, the Corporation shall suspend or cancel all assistance to the recipient.[12]

This has been the policy of CPB since March 1, 1974. An earlier document published by the Corporation, dated December 1, 1969, states specifically that "Even though the Corporation's grants are financed by mingled Federal

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[11] "Equal Opportunity and CPB Assistance", publication of the Corporation for Public Broadcasting, March 1, 1974, paragraph II.

[12] *Ibid.*, paragraph IV.

and private funds, the Corporation administers its programs in accordance with Title VI of the Civil Rights Act." [13] This document details specific discriminatory actions prohibited, required assurances from the applicant of compliance and periodic compliance reports, outlines procedures for complaints and details the actions which might be taken by CPB in the event of a finding of noncompliance. The task force was unable to learn from current CPB employees the reasons why this document is no longer CPB policy. As noted elsewhere in this report, CPB now takes the position that it is not a federal agency and therefore does not fall under the provisions of Title VI. The policy to terminate funds if a court or agency finds a violation is a good one as far as it goes, but fails to address CPB's responsibility to enforce the nondiscrimination provisions of the law and its contracts.

The Public Broadcasing Service is the representative organization of the member stations of the public broadcasting industry, and operates the nationwide interconnection system which distributes programs to the stations. In EEO matters PBS may provide stations with information, but has not established a clear policy or program of its own. The same may be said of National Public Radio, which has now merged with APRS. Both groups have left the burden of EEO matters to the Corporation.

SUMMARY AND RECOMMENDATIONS

It is the conclusion of the Task Force on Nondiscrimination in Public Broadcasting, in light of the above-detailed findings, that improvements can be made in several areas which will serve to strengthen existing legislation and provide adequate enforcement mechanisms to ensure equal opportunities and benefits from public

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[13] "Prohibition Against Discrimination under Programs receiving Financial Assistance from the Corporation for Public Broadcasting," publication of the Corporation for Public Broadcasting, December 1, 1969, paragraph I.

broadcasting to all individuals. The task force therefore wishes to present the following recommendations to the Subcommittee on Communications for its consideration.

A. *Statutes and Regulations*

1. The Federal Communications Commission should act to strengthen its programs for equal opportunity enforcement. It should consider sanctions which could be taken against licensees whose EEO programs fall short or against whom finally adjudicated, valid complaints are received. These sanctions could include short-term renewals and non-renewal in cases of clear noncompliance. The FCC's programs should be clearly stated for its licensees and it should be made evident that the Commission will not hesitate to use the measures available to it in the event of a failure to comply with EEO regulations by a licensee.

2. The FCC should review annually the data gathered on its form 395 and use this data to identify stations with EEO problems. The FCC can then offer technical assistance to the station or invoke appropriate sanctions to curtail the problems immediately.

To this end, and to fully implement its memorandum of understanding with the EEOC, the Congress must be willing to authorize adequate funds and personnel for the FCC to carry out the more vigorous EEO enforcement program contemplated by the task force's recommendations. The task force believes that substantial additional personnel will be needed to carry out the enforcement and technical assistance programs contemplated by the aforenoted recommendations. Several of these positions should be designated to work exclusively on developing equal employment opportunities for minorities and women at public broadcasting stations.

3. As the Subcommittee on Communications suggested in its April 1977 report, the Federal Communications Commissions should reconsider and strengthen its EEO rules, especially insofar as they apply to public broadcasting. Specifically, the Subcommittee on Communications recommended that the FCC should:

(1) rescind its rules exempting stations with ten or fewer employees from filing written affirmative action plans and exempting stations with less than 50 employees from providing a workforce survey;

(2) revise the Annual Employment Report (Form 395) to reflect the actual positions and titles used by broadcasters;

(3) increase significantly its EEO personnel and consider establishing a separate EEO unit for public broadcasting; and

(4) develop a formal working arrangement with the EEOC through a memorandum of understanding in order to facilitate the exchange of information.

Several of those recommendations have been implemented or are being actively explored by the FCC. For example, effective August 31, 1977, all broadcast stations, including non-commercial educational radio and television stations, are required to file written affirmative action plans where the station employs five or more persons on a full-time basis. On November 9, 1977, the Commission also adopted a Notice of Proposed Rule Making in Docket No. 21474 looking towards the possible revision of the Form 395 job categories and inclusion of additional employment information. In addition, a draft Memorandum of Understanding has been developed by the staffs of the FCC and EEOC and final approval of that accord by the respective agencies is contemplated by March 1, 1978. With respect to the Subcommittee's recommendation that the number of EEO personnel at the FCC be increased, the agency did request an additional EEO position in the Broadcast Bureau for FY 1978, which is responsible for the monitoring and enforcement of the FCC's EEO regulations, which was not approved. While the FCC's FY 1979 budget proposal did not include any increased position levels of the Broadcast Bureau, it is apparent that additional person-

nel would be required to effectively discharge any increased EEO responsibilities and enforcement efforts.

4. The Public Broadcasting Act of 1967 should be amended to make it clear that the Corporation for Public Broadcasting and its grantees are subject to the provisions of Title VI and Title VII of the 1964 Civil Rights Act. Although the task force concurs with the opinions of the Department of Justice and HEW that CPB is in fact already covered by these statutes, it is felt that an amendment to the Act would clarify the Corporation's obligations and end any question as to this matter. This could be accomplished by amending Section 396(b) as suggested in the recent proposals by President Carter.

The amendment suggested above would make clear that CPB was covered by Section 601 of Title VI. However, if the Congress wishes CPB to have the full range of powers available to vigorously enforce the nondiscrimination provisions of Section 601, then the Public Broadcasting Act should be further amended to provide that CPB shall have the power and responsibility as if it were a federal agency, under 42 U.S.C. 2000d-1 (Section 602) to enforce Title VI. If changes are made in the funding provisions, giving CPB more control of the disbursing of federal funds, then this amendment becomes even more desirable.

However, as noted above, it is not clear to what extent Title VI applies to employment practices. If the Subcommittee wishes to make it clear that employment practices are covered, a further amendment could be made to the Public Broadcasting Act, making clear that the Board of CPB has the responsibility to ensure nondiscrimination in the use of its funds, including the employment area, and stating that the employment exception in Section 603 of Title VI is not applicable to the public broadcasting industry.

5. Section 396(c)(1)-(2) of the Public Broadcasting Act should be modified so as to list among the types of people identified for participation on the Board of CPB

citizens whose interest or professional experience has been in the area of civil rights and minority and women's concerns and programs. By encouraging the appointment of individuals who share in these concerns, it will be possible to further the development of a strong commitment on the part of the Board to the elimination of discrimination in public broadcasting. Such appointments would also serve to give women and minority groups an active voice in public broadcasting and help to eliminate the current sense of alienation felt by these groups toward that industry.

B. *Coordination*

6. To ensure continued coordination among the agencies responsible for enforcement of the various statutes governing equal opportunity in public broadcasting, a specific memorandum of understanding should be negotiated to which all the agencies will be party, detailing the methods by which information will be shared on the public broadcasting industry and the steps to be taken in the event that information is developed indicating EEO noncompliance by a broadcaster. The agencies should monitor the operation of this agreement and evaluate it periodically to ensure that the objectives contained in the memorandum are being met.

C. *Statistical Information*

7. Positive steps have been taken by the FCC to improve the collection of data relating to employment in public broadcasting. The revision of the 395 form should greatly assist in developing equal opportunity statistics, provided that the revisions result in information which will indicate the actual positions occupied by minorities and women and the trends toward upward mobility occuring at the stations. The FCC should seek the assistance of EEOC in developing the most useful information to be included on the revised form 395.

D. *Role of CPB, PBS, and NPR*

8. The Corporation for Public Broadcasting, as an entity providing federal financial assistance, must assume the responsibility for oversight of those funds to ensure that they are used in a nondiscriminatory manner. In vesting this responsibility with CPB it is possible to continue the insulation from the federal government which the Act is intended to protect. To conform its commitment to this responsibility CPB should issue public notice similar to its publication of December 1, 1969 outlining its position and the compliance expected from its grantees and subgrantees.

9. If CPB is given enforcement powers similar to a federal agency, then it must take the responsibility for ensuring that the federal funds which it dispenses are used in a non-discriminatory manner. If this were done by CPB itself, this would tend to avoid government interference with the broadcast industry, one of the purposes of the Public Broadcasting Act. Ideally, CPB should take the responsibility for performing both oversight and enforcement functions. That is, CPB should conduct pre-award reviews to determine an applicant's eligibility to receive federal funds and post-award reviews to determine whether a recipient remains in compliance with applicable statutes, and investigate complaints received regarding their recipients. This activity will, of course, require a reallocation of funds or additional funds for CPB.

10. CPB should be required to describe its compliance progress in its annual report to the President, which in turn could be included in his annual report to the Congress. CPB's officers and directors should also be required to be available to testify before appropriate committees of the Congress regarding the Corporation's compliance efforts as a part of the Congressional oversight process.

11. The Public Broadcasting Service and National Public Radio should make a clear commitment to equal

opportunity and nondiscrimination in their areas of public broadcasting.

12. The task force is concerned about the impact of state and local civil service rules and procedures on equal employment opportunity. The public broadcasting entities have stated that these civil service rules take precedence over federal law and sharply limit the effectiveness of CPB on other alternative EEO enforcement efforts. The task force felt that a comprehensive statement of the problem was beyond our competence and mandate from the Subcommittee. We suggest, however, that the Committee request that the Civil Service Commission make a study of the exact extent of the problem and make specific recommendations for its solution.

/s/ _____
Equal Employment
Opportunity Commission
Issie Jenkins
Mary Wilson

/s/ _____
Department of Justice
Sidney R. Bixler
Mary Gallion

/s/ _____
Department of Health,
Education and Welfare
Francesta E. Farmer

/s/ _____
Federal Communications
Commission
Richard J. Shiben
Glenn Wolfe

CERTIFICATE OF SERVICE

I certify that copies of the Opposition of the Department of Health, Education and Welfare to the Motions for Summary Judgment by Plaintiffs and the Public Broadcasting Defendants were mailed, postage prepaid, first class, this 25th day of October 1979, to the following counsel of record.

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/s/ Anne Buxton Sobol
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Number CV 78-4715 R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ETC., ET AL, PLAINTIFFS

vs.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA DBA KCET, ET AL., DEFENDANTS

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hearing: November 5, 1979

Time: 10:00 A.M.

INTRODUCTION

This is a case of first impression, and was brought as a class action to determine the constitutional and statutory rights of the deaf and hearing impaired to participation in, enjoyment of, and access to *public tax supported television.*

For the past forty years and up to the present time, the deaf and hearing impaired have not only not been allowed "to ride in the back of the [television] bus"

while having to pay to permit others to have a free ride on that bus, but at this writing, the only remedy even offered to them, after all these years, is to permit them to ride—at some future date—not even "in the back of the bus"—but in some equivalent of a "travail" *harnessed to the back of the bus, AND* to pay a fare for that ride!

We are here not dealing with a "sometime" thing—a mere recreational device equivalent to a "pachinko" ball machine to while away ones leisure time.

We are dealing with the electronic media which have swiftly become a major factor in the dissemination of ideas and information. *Columbia Broadcasting Sys. Inc.* v. *Democratic Nat. Com.*, 412 U.S. 94, 93 S.Ct. 2080, 2093, 36 L.Ed. 2d 772 (1973).

The judicial recognition with which the Supreme Court may have felt compelled to accord the actions of the FCC in dealing with *commercial* television licensees, and the Court's restrained handling of the latters' First Amendment rights, are not at all applicable in this case. *Id.*

"Public broadcasting, of course, raises quite different problems from those tendered by the [commercial] outlets involved" in previous litigation. (Mr. Justice Douglas, concurring opinion in *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat. Com., supra*, 412 U.S. at 149, 93 S. Ct. at 2109.)

Plaintiffs respectfully submit that there never has been any doubt—even in the instance of commercial broadcasters—that "[i]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be abridged by Congress or by the F.C.C.". *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed. 2d 371 (1969); requoted with approval, *Columbia Broadcasting Sys., Inc.* v. *Demo-*

cratic Nat. Com., supra, 412 U.S. at pp. 101-2, 93 S.Ct. at p. 2086.

The fact the deaf and hearing impaired have been and are being excluded from and denied "the right to receive suitable access" to public television is beyond dispute.

In answer to plaintiffs' Interrogatory No. 14, the FCC stated:

> Because television is both an aural and a visual medium, those who are unable to assimilate the aural portion of the programming are not receiving the full benefit of television. Thus, for the hearing impaired, television has been less than a viable means of communication.

Those who share the responsibility for this denial of the fundamental constitutional and statutory rights are directly entwined in governmental action—either directly as formal constituent departments and agencies of the federal and state governments, or so wholly subsidized and controlled by those governments as to constitute them arms of the government.

Plaintiffs respectfully submit that the remedy to be fashioned by the Court is to decree that public broadcasting must from hereon out, become what its name denotes—*public* television—affording to *all* of the public the right "to receive suitable access" to all the social, political, esthetic, moral and other ideas and experiences that public television offers, without abridgement or condescension—which can only be accomplished by the *open* captioning of all broadcasts.

In support of this position, counsel for plaintiffs and the class they represent, respectfully submits this brief.

STATEMENT OF FACTS

The plaintiffs and class representatives, MARCELLA M. MEYER and SUE GOTTFRIED, each of whom is either deaf or has such a severe hearing loss, as to be unable to hear the aural portion of television broadcasts,

bring this action for injunctive relief, for compensation as class representatives and for attorneys' fees.

The class consists of all persons having a physical impairment, that is, the loss of hearing or a record of such impairment, or are regarded as having a hearing impairment severe enough to limit their enjoyment of the aural portion of television broadcasting, without the use of hearing aids, within the television viewing area served by the defendant, COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA doing business as KCET, included within the Counties of Los Angeles, Orange, Ventura, Riverside and San Diego, State of California.

A. *The Deaf and Hearing Impaired.*

The hearing world can no longer ignore the existence of the deaf and hearing impaired—and, unfortunately, it must constantly be reminded of the enormity of the trauma involved, since those who are in full possession of that sensory organ have for too long taken it for granted, like breathing.

Helen Keller, who suffered from the loss of both the sense of sight and of hearing, stated in no uncertain terms:

> "The problems of deafness are deeper and more complex, if not more important, than those of blindness.
>
> "Deafness is a much worse misfortune for it means the loss of the most vital stimulus, the sound of the voice that brings language, sets thoughts astir and keeps us in the intellectual company of man."

The brochure "So All May Hear", an introduction to the Ear Research Institute, by Howard P. House, M.D., addresses the extent of the problem and explains the reasons for the apathy with which the problem is treated.

> "Loss of hearing is America's largest, yet least recognized, physical ailment. More people suffer from

it than from heart disease, cancer, blindness, tuberculosis, multiple sclerosis, venereal disease, and kidney disease combined.

"One of every ten persons in this country is affected to some degree. One out of nearly one hundred have extreme difficulty understanding speech. Yet, we pay less attention to hearing loss than to any other major affliction.

". . . hearing loss is invisible and usually painless. *It is a hurt that does not show.* Therefore, it seems less important than other disabilities, but for those who are profoundly hard of hearing, or in fact deaf, and live in a world of silence, the emotional pain is devastating.

"The National Health Education Committee stated in a study published in 1976 that the numbers of afflicted with hearing impairment are increasing . . .".

The issue of the numerosity of the class has been determined by the Court in its certification of the class, but a summary of some of the statistics is not out of order.

According to the answer of the defendant, CORPORATION FOR PUBLIC BROADCASTING (hereinafter sometimes referred to as "CPB") to plaintiffs' Interrogatory No. 20, the number of deaf and hearing impaired nationwide amounts to 14,130,697, of which at least 293,681 are deaf or have hearing impairment severe enough to deprive them of the aural portion of television.

Ms. Brenda Rawlings, Senior Research Associate, Office of Demographic Studies, Gallaudet College [for the deaf], Washington, D.C., as late as August 21, 1979, estimated that in the counties of Los Angeles, Ventura, Orange, Riverside, San Diego and San Bernardino, there were currently at least 878,300 hearing impaired persons, of whom 114,300 would be classified as deaf (an upward revision of figures previously based on a 1971 study and on a 1975 population census). She also estimated that

nationwide the hearing impaired persons exceeded 14,000,000, and there were in excess of 1,515,999 statewide in California.

* * * *

C. *The Importance of Access to Television for the Deaf and Hearing Impaired.*

Plaintiffs do not want to belabor a subject which seems so patent, but because the industry has appeared so oblivious to the subject, some focus on the subject is not out of place.

In June 1971, in the HRB-Singer, Inc. Report, prepared for HEW, *supra*, the authors commented:

> Considering the fact that a major portion of the news presented to the general public on a day-to-day basis is via television (including announcements requiring immediate public response such as the recent earthquake in California and food recalls by the Food and Drug Administration) the need for visual TV announcements takes on vital significance for the hard-of-hearing community.

Donald V. Torr, Professor of Educational Technology, Gallaudet College, Washington, D.C. in November 1976, commenting on the fact that open captioning of television programs would open to students "a portion of the world which has been denied to individuals with serious hearing loss for the 30-year history of television", stated:

> If a person has a serious hearing impairment, television is for the most part impossible to comprehend. The occasional expert lip-reader does not really have the opportunity to see the speaker continuously. The cameras are sending images of everything but the person doing the talking. With captioning, the hearing-impaired person has the potential to know with certainty everything that is happening.

* * * *

There is another possible benefit. We do not have research which supports what I say but it is my hope that continual exposure to captions associated with intrinsically interesting visuals will in subtle ways help the hearing-impaired youngsters acquire a mastery of the English language.

* * * *

It is also my hope that all of these students, whether they enter college or not, will have a broader understanding of the world around them because of the information which is available through television. Deafness isolates a person drastically. The deaf child misses so much. When I speak of information I mean not only the abstractions of a series such as the *Ascent of Man* but information which most people would call trivial. Through the most inane situation comedy deaf children can conceivably learn vocabulary, e.g., end table, hutch, stairwell, corridor. The terms will be associated in time with a visual stimulus and may, with repetition, provide the child with a mental association between the printed word and the object. This connection is easily made by hearing children through speech and hearing. The deaf child misses much of this incidental learning. In addition, it is possible that the role and position of prepositions, articles, and other parts of "speech" will unconsciously become a part of the child's language skills.

Ms. Doris Caldwell (previously referred to) on June 9, 1978, likewise commenting on the benefit of captioning, stated that the deaf and hearing impaired should have the chance "to share fully in this 20th Century wonder from the evening news to Johnny Carson, from documentaries to situation comedies, and from serious drama and opera to live sports!"

* * * *

II

THE DEFENDANTS ARE EACH GUILTY OF DENYING THE PLAINTIFFS DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAW

A. *By defendants, COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, dba KCET, LOPER AND LAMB.*

1. KCET, on October 14, 1977, estimated that between 7% and 10% (490,000 to 690,000) people had some degree of hearing impairment in the Greater Los Angeles area.

2. That on May 6, 1977, a protest march took place at the premises of KCET; that a copy of the "protest circular" and "fact sheet" is attached hereto as plaintiffs' Exhibit "4"; that as a result thereof, a meeting was held between 25-30 members of the hearing impaired community and the following members of the KCET Staff: William J. Lamb, Vice-President and General Manager; Cheri Rosche, Director of Programming and Station Development; Joan Lence; Nancy Rishagen, Director of Personnel.

3. Although for three years prior thereto, KCET refused to air the captioned "ABC Evening News", since said protest march and commencing on May 23, 1977, KCET has aired the captioned "ABC Evening News" *at or after 11:30 P.M. on the evening of the day in which it is originally broadcast by ABC*, with a repeat the following morning *at 6:30 A.M.*

4. In the fiscal year ending June 30, 1978, KCET presented at least 6500 hours of programming of which 400 hours consisted of local programming (KCET-4), currently broadcasting 20 hours per day, 7 days a week, or 600 hours per month (Answer, para. 10, lines 11-12).

5. During said fiscal year, KCET broadcast, according to its own admission (KCET-6) approximately 528 hours of programs which were either "captioned, signed or sub-

titled". This was approximately 8% of the programmed hours. Moreover, the monthly range went from a high of 62¼ to a low of 34¼ hours, or an average of 44 hours out of a monthly broadcast of 600 hours, or an average of approximately 7½% of the monthly broadcast time.

6. When actually analyzed as to what was presented, the picture is even more dismal. Of the broadcasts, the Captioned ABC Evening News, a one-half hour program, was broadcast at 11:30 P.M. (or 12:00 midnight), Mondays through Fridays, and the identical program was rebroadcast at 6:30 A.M., Tuesdays through Saturdays. In KCET-6, this is set forth as a weekly broadcast of 10 one-half hour programs, when in reality it consisted of only 5 one-half hour programs. If this calculation is correct, then the total broadcasts for the year would have to be reduced by 180 hours, making the total "captioned, signed and subtitled" programs only 348 hours, or only 5⅓% of the broadcast time.

7. Moreover, many of the programs listed as "subtitled" or "captioned" were movies or programs in a foreign language so that the subtitles were not solely for the benefit of the deaf and hearing impaired. These types of broadcasts accounted for many of the programs that lasted for more than one hour.

8. Further analysis of the broadcasts for the fiscal year ending June 30, 1978, indicate that hardly a scintilla were broadcast in "prime time", either as claimed by the defendants (6:00 P.M. to 11:00 P.M.), or as stated by the A. C. Nielsen Co. 1979 Report (Monday-Saturday, 8:00 P.M. to 10:00 P.M.; Sunday, 7:00 P.M. to 10:00 P.M.)

9. During said fiscal year, the deaf and hearing impaired were afforded *an evening broadcast* (other than the ABC Evening News, which was broadcast at times varying from 11:30 P.M. on some evenings to 12:30 A.M. on others) as follows: JULY: 11 out of 31 evenings; AUGUST: 5 out of 31 evenings; SEPTEMBER: 1 out of 30 evenings; OCTOBER: 4 out of 31 evenings;

NOVEMBER: 5 out of 30 evenings; DECEMBER: 4 out of 31 evenings; JANUARY: 4 out of 31 evenings; FEBRUARY: 1 out of 28 evenings; MARCH: None out of 31 evenings; APRIL: 2 out of 30 evenings; MAY: 1 out of 31 evenings; JUNE: None out of 30 evenings. If the children's programs and the foreign films are excluded, the situation is even more bleak.

10. During the fiscal year commencing July 1, 1978, through December 31, 1978, the portion of that year immediately prior to the filing of this action, and for which the defendants supplied information (KCET-6), there was an actual deterioration. Accepting the defendants own statement of total broadcast time, viz., 20 hours per day, 7 days per week, and 600 hours per month, an analysis of the programs broadcast with "captions, signing or subtitles" shows the following: 253¼ hours out of 3600 hours or 7%. In the comparable 6 months of the fiscal year commencing July 1, 1977, the defendants broadcast 289.5 hours of "captioned, signed or subtitled" programs or 8% of the broadcast time. Thus, there was a reduction of 36¼ hours or 1%.

11. As to the number of evenings on which more than the Captioned ABC News was broadcast, the record is as follows: JULY: 1 out of 31; AUGUST: 1 out of 31 (and that was a children's program); SEPTEMBER: 1 out of 30; OCTOBER: 2 out of 31; NOVEMBER: 1 out of 30; DECEMBER: 3 out of 31. It should be noted that on some evenings the Captioned ABC Evening News was not even broadcast until after midnight (See December 6, 1978), so that on that evening there was not even a one-half hour broadcast.

12. That none of the programs broadcast by KCET with "captions, signing or subtitles" were produced by KCET, although during the fiscal year 1977/78 and the 6 months of fiscal year 1978/79 KCET produced for its own use and the use of other public television stations many programs, but none with "captions, signing or subtitles".

13. The defendant KCET has under date of September 6, 1979, furnished counsel for plaintiffs a "listing of captioned, signed and subtitled programs broadcast by KCET from January 1, 1979 through June 30, 1979, denominated KCET-6A".

It can be assumed that any improvement in the permance by the defendants was not unrelated to this suit.

Assuming that this exhibit is a correct transcription of the defendants' activities, and using its own figures, viz., 20 hours per day, 7 days per week, and 600 hours of broadcasting per month, an analysis shows the following:

14. For the six month period the total of all "captioned, signed and subtitled" programs was 388¾ hours out of 3600 hours, or an increase over the preceding six months prior to filing this lawsuit of 135½ hours, or approximately 33⅓%, but still only approximately 19% of the total broadcast time.

15. However, a further analysis shows that this increase is more cosmetic than real—even though counsel for the plaintiffs respectfully submits that the pendency of this lawsuit triggered some improvement.

16. The range of monthly "captioned, signed and subtitled" programs went from a low of 43 hours or 7%+, to a high of 15%+. The first three months represented the "normal" broadcasting—the last three months included the inauguration of programs (Michael Jackson and 28 Tonight) which were merely "signed"—many being "oldies" rebroadcast with a picture of a signing interpreter surperimposed on an old taped program, and unintelligible even to competent "signers", and wholly unintelligible to the average deaf and hearing impaired person.

17. Moreover, using KCET's definition of "prime time" viz., 6:00 P.M. to 11:00 P.M., the total available prime time per week would be approximately 35 hours or 105 hours per month, or 630 hours for the six month period.

The number of "captioned, signed or subtitled" programs during prime time were as follows *JANUARY*—5 hours (including a non-recurring 1 hour "signed" Presidential speech), and the remainder consisting of a 2 hour program on two separate evenings) entitled "Special Section" [whatever that might be], so that on 29 evenings the deaf and hearing impaired had not one minute of prime time; *FEBRUARY*—1½ hours of prime time consisting of 3 one-half hours of "signed" income tax panel discussions, so that on 25 evenings not one minute of prime time was made available; *MARCH*—1½ hour of prime time, consisting of an additional ½ hour of "signed" income tax panel discussion, and 2 one-half hour programs called "Free-Style". Again, during this month, not one minute of prime time was available on 28 evenings; *APRIL*—this month showed an increase, the prime time broadcasts amounting to approximately 31 hours out of over 105 hours available. Close examination discloses that this month was the inauguration of the "Michael Jackson" and "28 Tonight" interview shows, wholly "signed", many consisting of repeat of old tapes with a superimposed figure of a person signing the conversation. "Michael Jackson" accounted for approximately 22 hours out of the 31 hours, and the remainder representing, in part, 4 one-hour broadcasts of the special showing of the "Scarlet Letter" which was broadcast with captions, including the one-half hour "signed" energy special by President Carter. The 22+ hours which were "signed" were a complete waste as far as the average hearing impaired person was concerned, and even skilled "signers" found the programs "unreadable" and distracting. On six evenings there was no prime time available at all; *MAY*—the prime time programs dropped to 14½ hours consisting entirely of the "signed" Michael Jackson and 28 Tonight shows, many of which were "oldies" relayed with a superimposed interpreter "signing" the discussion. Apparently, not one captioned program was presented; *JUNE*—the prime time programs

amounted to but 17 hours, and again all apparently consisted of the same type of "signed" Michael Jackson and 28 Tonight shows.

18. It should be noted that the reruns of the earlier KCET locally produced public affairs series, "Michael Jackson" were interpreted in American Sign Language for the hearing impaired from April 2, 1979, until those reruns ended on July 22, 1979. All of these reruns could have been captioned and broadcast with captions.

19. Since April 2, 1979, "28 Tonight", currently KCET's regularly-scheduled public affairs series broadcast Monday through Friday at 7:30 P.M., has been interpreted in American Sign Language for hearing impaired viewers. All of these programs were wholly or partly from scripts and could have been broadcast with open captions.

20. When we examine the balance of the broadcast spectrum, it is equally disheartening. Of the total claimed broadcasts of 388¾ hours, the following appears:

a) *ABC Evening News* consisted of *125 hours*, of which one-half or 62½ hours was broadcast at 11:30 P.M. or midnight or later, Monday through Friday, and 62½ hours was the identical broadcast at 6:30 A.M. the next morning, including 6:30 A.M. Saturday morning. There were no news broadcasts on Saturday or Sunday evenings.

b) On at least 33 days, if it were not for this program, there would have been no programs at all.

c) *Childrens' programs* consisted of approximately 49 hours of programs, many of which the defendants claim were "captioned, signed or subtitled" because an occasional letter or word may have been exhibited during the performance. If these programs are excluded, there would be an additional 6 days of no programs at all for adult enjoyment.

d) *Adult programs.* There were approximately 211¼ hours of what could be termed adult fare.

e) Of this, of course, only 70½ hours were in prime time, of which only about 12½ hours were actually captioned.

f) Of the remainder, approximately 19½ hours consisted of movies in a foreign language with English subtitles, which had to be broadcast in that manner so even the hearing could follow the action, and almost all of the programs, captioned or not, were broadcast after 11:30 P.M. and before 10:00 A.M.

21. It would be fair to state that approximately 75% to 90% of the programs which the defendants broadcast during this last six month period, were unintelligible to the average hearing impaired viewer, or broadcast at a time which, in effect, made them unavailable for all practical purposes.

22. Plaintiffs note that commencing June 21, 1979, KCET began broadcasting 24 hours a day, seven days a week. This, of course, undermines any claim of these defendants that they are too impoverished to make the small investment necessary to correct the unequal treatment and discrimination to which they subject the deaf and hearing impaired. This was noted in the Los Angeles Times of July 31, 1979, as follows:

> Now that KCET Channel 28 has become the nation's only public television station to broadcast 24 hours, there's an obvious question to be answered.
>
> Why?
>
> After hearing KCET plead empty pockets for so long, how, golly gee, there just isn't enough money for those little extras like news department improvements, etc., it is stupefying to see the station allocate the coin to stay on the air 24 hours to serve a portion of the late-night audience probably outnumbered by the KCET executives who made the decision to extend around the clock.
>
> The cost of the extension is not great, only the combined $26,000 pay of two engineers to baby-sit the all-night programming. But it's money a finan-

cially strapped station (as all public stations seem to be) could better deploy elsewhere.

Around the clock?

KCET says it can put the time to good use, airing additional programs it gets through the Public Broadcasting Service and rerunning regular prime time programs it has not had room to rerun.

Applauding the KCET move, Barry Chase, PBS public affairs programming chief, says: "Up to now, the early morning audience has either been ignored or been subjected to programs that have little relevance to their lives."

Says KCET local program director Jerry Hughes: Night owls are suffering through all those old movies and really prefer "programs with substance."

Yes, I can see it now, the euphoria of a returning shift worker discovering that instead of having to endure "Slaughter of the Vampies", he has an alternative-the SALT hearings.

KCET's around-the-clock program is a curious priority. Unquestionably, there are programs of "substance" the station can air in the wee hours. But really now, who is going to watch them? Certainly not enough viewers to justify the investment, no matter how small.

Why spend money to extend programming through the night when, as it is, the station is not serving the broadest possible cross section of the public during the prime time part of its broadcast day that holds the overwhelming preponderance of its viewers?

Why not instead apply the engineer's salary to the station's inadequate local programming budget? Or buy a piece of equipment?

Of course, KCET can always revel in this new around-the-clock prestige. Who knows! A time may come when it will be able to boast of being the nation's only public station to win the time slot at 3:45 a.m. [Emphasis ours].

23. It should be noted that the percentage of time devoted to captions, signing and subtitles is further diminished by this increase broadcasting, except that during the "wee" hours, when everyone is sleeping, KCET has on occasion broadcast old silent pictures, which, of course, have only subtitles—apparently, we assume, in the absence of "programs of substance".

* * * *

IV

THE DEFENDANTS ARE EITHER RECIPIENTS OF OR DISBURSERS OF FEDERAL AND/OR STATE FINANCIAL ASSISTANCE, OR BOTH, AND DISCRIMINATE IN THEIR PROGRAMS AND ACTIVITIES AGAINST THE PLAINTIFFS SOLELY BY REASON OF PLAINTIFFS' HANDICAP.

Facts with reference to the receipt and disbursements of Federal and State financial assistance:

A. *Defendant, CORPORATION FOR PUBLIC BROADCASTING ("CPB"):*

1. CPB receives funds from the federal government. In its answer to plaintiffs' Interrogatory No. 5, CPB contends that these funds become a part of CPB's general funds and when CPB makes a grant, it does so out of its general funds. Thus, CPB apparently takes the absurd position that it does not make grant of federal funds but, rather, it makes grants from CPB funds.

2. But according to the audited financial statements of CPB, it received federal funds and disbursed federal funds to defendants KCET and PBS as follows (since the enactment of the Rehabilitation Act of 1973):

a) *Fiscal year ending June 30, 1974*

RESOURCES AVAILABLE

Federal appropriation	$47,750,000
Federal grants & contracts	113,033
Non-Federal contributions & other income	5,596,701
Interest	853,145
Current year revenue	$854,312,879

Distributions to KCET and Public Broadcasting Service ("PBS") Provide programs for Public Television

A. *Production*	
KCET:	$ 41,675
PBS:	2,250
B. *Distribution*	
PBS:	8,145,700
C. *Support Station Operations*	
KCET:	163,000
D. *Develop Public Awareness and Understanding by Program Promotion and Understanding*	
KCET:	42,954
PBS:	243,000

b) *Fiscal Year ending June 30, 1975*

RESOURCES AVAILABLE

Federal appropriation	$ 62,000,000
Federal grants and contracts	90,000
Non-Federal contributions & other income	9,333,764
Interest	1,330,040
Current year revenue	$ 72,753,804

Distribution to KCET and PBS: Provide programs for Public Television

A. *Production*	
KCET:	$ 207,862
PBS:	9,391,366
B. *Distribution*	
PBS:	9,947,922
C. *Engineering & Development*	11,000
D. *Undertake Development & Support Activities*	
1. *Support Station Operations*	
KCET:	520,269
2. *Develop Public Awareness and Understanding by Program Promotion and Advertising*	
KCET:	50,000
E. *Public Television Licensee Use of CPB Funds Made Available for SPC-1 (Station Program Co-operative)*	
KCET:	75,800

c) *Fiscal Year ending June 30, 1976*

RESOURCES AVAILABLE

Federal appropriation	$ 78,500,000
Federal grants and contracts	105,500
Non-Federal contributions & other income	5,577,466
Interest	951,625
Current year revenue	$ 85,134,591

Distributions to KCET and PBS: Provide programs for Public Television

A. *Production*	
PBS:	$ 9,243,372
KCET:	2,052,058
B. *Distribution*	
PBS:	10,824,665
C. *Engineering & Development*	
PBS:	97,865
D. *Developing Program Quality*	
KCET:	29,682
E. *Support Station Operations*	
KCET:	804,569
F. *Develop Public Awareness and Understanding by Program Promotion and Advertising*	
KCET:	50,000
G. *Licensee Use of CPB Discount Funds SPC II*	
KCET:	87,600

d) *For the 15 months ended September 30, 1977*

Revenues:	
Federal appropriations	$120,500,000
Grants and contracts:.	
Federal	115,500
Non-Federal	369,387
Grant refunds	527,861
Interest income	4,079,018
	$125,591,766
Distributions to KCET and PBS:	
A. *Production*	
KCET:	$ 1,164,260
PBS:	3,106,683
B. *Distribution*	
PBS:	15,098,263
C. *Engineering and Development*	
KCET:	11,600
D. *Support Station Operations*	
KCET:	1,303,653
E. *Providing Training Internships, Fellowships and Workshops*	
KCET:	21,847
F. *Develop Public Awareness and Understanding by Program Promotion and Advertising*	
KCET:	50,000
PBS:	211,847

* * * *

E. Defendants, COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA doing business as KCET ("CTSC" and/or "KCET"), LOPER AND LAMB:

1. KCET is a local television station, servicing its own viewing area, with programs it produces itself as well as programs acquired through the PUBLIC BROADCASTING SERVICE and from other sources. KCET is also a major producer of national programming made available to the PUBLIC BROADCASTING SERVICE and other public television stations throughout the United States. KCET is also a producer of programs with funds supplied by CORPORATION FOR PUBLIC BROADCASTING, the PUBLIC BROADCASTING SERVICE and the DEPARTMENT OF HEALTH, EDUCATION AND WELFARE.

2. KCET's viewing areas encompasses Los Angeles, Orange, and Ventura counties, and parts of Riverside and San Diego counties.

3. Defendants, JAMES L. LOPER and WILLIAM J. LAMB, have at least since January 1977, and now are in the managerial control of and are supervisorily responsible for the content, format and nature of the television programs and activities broadcast by defendant KCET.

4. That the defendant KCET went on the air September 28, 1964; that in August 1968 it leased its transmitter site and equipment, but during the fiscal year 1973, it began a campaign to raise funds for its capital improvement program. It acquired color video tape recorders and became the West Coast relay center for national public broadcasting programs, picking them up from the East, recording them and feeding them to stations in the West; that in July 1970, it purchased its location at 4400 Sunset Drive, consisting of 4.5 acres, consisting of various structures, including broadcast studios, and on May 18, 1977, it completed its present 43,000 square foot structure, which included 128 offices, a 3600 square foot auditorium with full projection equipment, additional conference and

screening rooms, editing facilities and additional space used for television auction telethons.

a) That the construction of some of its physical facilities has been built with the use of funds received from the Federal Government.

b) Funds from the defendant CORPORATION FOR PUBLIC BROADCASTING were used for the acquisition and equipping of KCET's facilities on a matching basis of $1.00 of CPB's funds for every $2.50 obtained by KCET in non-federal income.

c) The defendant DEPARTMENT OF HEALTH, EDUCATION AND WELFARE has in the past made grants to KCET, and in 1978 granted KCET $280,000, representing sixty per cent (60%) of the cost of a new transmitter which tripled KCET's power; that these grants were conditioned on KCET's compliance with all federal laws, rules and regulations for a period of ten (10) years from the date of its latest grant, including the provisions of the Educational Television Facilities Act.

d) Since 1975, KCET has received a Community Service Grant ("CSG") from the CORPORATION FOR PUBLIC BROADCASTING, calculated in two steps. It received a basic amount equal to 0.1 per cent of the federal appropriation to CPB, plus an amount of the remaining funds reserved for television CSG's determined by KCET's share of total non-federal income of all stations. It is this total income which determines the amount of the pass-through grant to each station, including KCET.

e) Subsequent to June 30, 1978, the Television Community Service Grants—Supplemental Appropriations Bill, became law providing additional appropriations for the CORPORATION FOR PUBLIC BROADCASTING, of which KCET received $127,065.

f) In addition, in the fiscal year 1976/77, $110,651 was received from the CORPORATION FOR PUBLIC BROADCASTING for the construction of an earth termi-

nal to receive PUBLIC BROADCASTING SERVICE programming via earth satellite.

5. These defendants have refused to supply the plaintiffs with copies of their formal financial reports, but have supplied some financial information for the fiscal years ending June 30, 1976, June 30, 1977 (KCET-5) and June 30, 1978 (KCET-4), and have refused to supply any financial information for the fiscal years prior thereto and since the enactment of the Rehabilitation Act of 1973. Based on the information supplied, these facts appear:

a) That for the fiscal year ending June 30, 1976, KCET received gross revenues of $12,250,259 of which $2,670,-109 was received from program grants from federal agencies, $973,015 from public television agencies, and for facilities grants, $448,716 from public television agencies, and $1,234,014 from general operational grants. (KCET-5).

b) In fiscal year 1977 (July 1, 1976-June 30, 1977) KCET's total revenues were $13,395,984. This figure includes $1,303,305 (10%) from federal agencies; $2,551,-130 (19%) from the defendant, CORPORATION FOR PUBLIC BROADCASTING; $817,481 (6%) from the defendant, PUBLIC BROADCASTING SERVICE; $2,-814,196 (21%) from private business and industry; $1,481,414 (11%) from local and national tax exempt foundations and $3,688,011 (28%) from private subscriptions and contributions.

c) In fiscal year 1978 (July 1, 1977-June 30, 1978), KCET's total revenues were $13,864,861. This figure includes $2,298,160 (17%) from federal agencies; $36,050 from the defendant, CALIFORNIA PUBLIC BROADCASTING COMMISSION; $3,592,511 (26%) from the defendant, CORPORATION FOR PUBLIC BROADCASTING; $406,115 from the defendant, PUBLIC BROADCASTING SERVICE; $2,974,138 (21%) from business and industry; $981,506 (7% from local and national tax exempt foundations; and $3,874,932 (28%) from private subscriptions and contributions.

6. KCET subscribers are those contributing $15.00 or more annually to the station. As of June 30, 1979, KCET had 122,965 subscribers. Those contributions from business and industry and from subscribers are exempt from State and Federal Income Taxes.

7. That according to the defendant, CALIFORNIA PUBLIC BROADCASTING COMMISSION, it distributed to the defendant KCET during fiscal year 1977/78 the sum of $36,060 for television production, although KCET in its Answer admits only receiving $25,000 (Answer, para. 9).

8. Subsequent to June 30, 1978, the Television Community Service Grants—Supplemental Appropriations Bill became law, providing additional appropriations for the CORPORATION FOR PUBLIC BROADCASTING, of which KCET received $127,065. Thereafter, KCET acquired a new transmitter that tripled its power, at a cost of approximately $500,000, of which $280,000 or approximately 60% was received by KCET from the defendant, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE.

9. In addition, $110,651 was received from the CORPORATION FOR PUBLIC BROADCASTING for the construction of an earth terminal to receive PUBLIC BROADCASTING SERVICE programming via earth satellite. (KCET-4).

10. According to CPB's answers to plaintiffs' Interrogatory No. 5, CPB distributed the following sums to KCET:

a) During fiscal year 1974, funds distributed by CPB to KCET included $41,675 for program production, $163,000 to support station operations, and $42,954 to develop public awareness and understanding by program promotion and advertising. All or most of these distributions were made from CPB's general funds, the most substantial source of which was the federal government.

b) During fiscal year 1975, funds distributed by CPB to KCET included $207,862 for program production,

$520,269 to support station operations, $50,000 to develop public awareness and understanding by program promotion and advertising, and $75,800 for public television licensee use of CPB funds made available for SPC-I (Station Program Cooperative). All or most of these distributions were made from CPB's general funds, the most substantial source of which was the federal government.

c) For fiscal year 1976, funds distributed by CPB to KCET included $2,052,058 for program production, $29,682 to develop program quality, $804,569 to support station operations, $50,000 to develop public awareness and understanding by program promotion and advertising, and $87,600 for licensee use of CPB discount funds (SPC-II). All or most of these distributions were made from CPB's general funds, the most substantial source of which was the federal government.

d) During the fifteen months ending September 30, 1977, the funds distributed by CPB to KCET included $1,164,260 for program production, $11,600 for engineering and development, $1,303,653 to support station operations, $21,847 to provide training internships, fellowships and workshops, and $50,000 to develop public awareness and understanding by program promotion and advertising. All or most of these distributions were made from CPB's general funds, the most substantial source of which was the federal government.

e) During fiscal year 1978, funds distributed by CPB to KCET included $2,439,096 for program production, $34,077 for engineering and development, $1,099,712 to support station operations, $9,626 to provide training internships, fellowships and workshops, and $10,000 to develop public awareness and understanding by program promotion and advertising. All or most of these distributions were made from CPB's general funds, the most substantial source of which was the federal government.

f) During fiscal year 1979, funds distributed by CPB to KCET included $1,048,500 for program production,

and $1,515,056 as a 1979 Community Service Grant. All or most of these distributions were made from CPB's general funds, the most substantial source of which was the federal government.

g) For fiscal year 1980, CPB has committed $1,000,000 to KCET for program production. All or most of this distribution will be made from CPB's general funds, the most substantial source of which will be the federal government.

11. Under the contracts between KCET and CPB, as condition for receipt of its moneys, KCET is required to comply with all applicable Federal, State and local laws and regulations.

12. Under the contract between KCET and HEW, KCET has agreed to comply with all Federal laws and regulations for a period of 10 years from the date of the last grant, which period will not expire until 1988.

* * * *

DECLARATION OF MARCELLA M. MEYER

The undersigned declares:

That she is the Executive Director of the GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC. ("GLAD"), and one of the plaintiffs in the above entitled action; that she resides at 2249 Kenilworth Avenue, Los Angeles, California.

That GLAD is a non-profit corporation having a total individual membership of deaf and hearing impaired persons totaling 1,096, and also has a membership of 47 organizations of deaf and hearing impaired persons, each organization having a membership of or serving the needs of from 11 to 2,500 persons each.

That attached hereto and made a part hereof is a resume of declarant's personal data, education and professional experience and organizational activity.

That she has been totally deaf since the age of six years, having lost her hearing as a result of scarlet fever; that she communicates in person by means of

manual signing and by lipreading, and has done so since the onset of her deafness; that she believes she is an expert in communication by manual signing and by lip-reading.

That she has been active in attempting to end the discrimination against the deaf, particularly in the field of television; that, in her opinion, the only viable means by which the deaf and hearing impaired will obtain equal access to television is by means of open captioning.

That she has monitored television over a period of years and as one experienced in communicating by sign language and lip-reading, she can state that television, without a visual supplementation of the aural channel, cannot be understood or followed by even the most expert lip-reader or signer. The reasons are obvious. News programs do not show sufficient close-ups of the newscaster to afford a three-dimensional view of the speaker's lips; most persons do not use their lips adequately to make lip-reading possible; and most newscasts turn from the newscaster to scenes, with a talk-over by some one who is not on camera, describing the picture; a picture of a burning building in England looks the same as a burning building in Los Angeles; with captioning, the hearing impaired person can know exactly what is being said and what is happening.

Manual interpretation is also not a remedy, as not all hearing impaired persons know sign language; usually, the picture of the person "signing" is super-imposed, and impairs the picture, and usually the picture is too small to make understanding the signs an effective means of communication. Moreover, even the deaf find that "signing" on television programs is distractive.

At the present time the only regularly captioned news program is broadcast at 11:30 P.M. over KCET, with a repeat at 6:30 a.m.; that these hours are not satisfactory as the deaf and hearing impaired persons are usually of a modest economic stature, with jobs to go to, and find it impossible to utilize, enjoy or participate

in these broadcasts. There are no other effective news broadcasts.

The promise of closed captioning is a chimera at the present time and holds no real hope for effective enjoyment and participation in the television medium by the deaf and hearing impaired in the foreseeable future. Moreover, its projected cost will impose a financial burden on the deaf and hearing impaired, most of whom are not in a financial position to afford the expense—particularly for the little use promised.

That the deaf and hearing impaired should not be forced to incur any added expense, over that to which the hearing are subjected, to enjoy public television which their taxes support.

That from 1974 to 1977, efforts to obtain even the minimal broadcast of the captioned ABC Evening News by KCET were unsuccessful.

That she is informed and believes and, therefore, asserts that open captioning is the cheapest most effectual method of making television available to all persons, without discrimination, physically or financially, against the deaf and hearing impaired.

That in an effort to obtain relief, she has held numerous conferences with members of the television industry, including the defendant KCET, and has prosecuted at least one petition before the FEDERAL COMMUNICATIONS COMMISSION; that based on her own experience, she has concluded that the defendants will not make television truly and fully available to the deaf and hearing impaired unless ordered to do so by judicial decree.

That as an example of the measures that had to be employed is the attached protest circular and fact sheet which was handed out by a picket line established around the defendant KCET; that as a result of the picket line and the fact that its license was coming up for renewal, she believes that that station began broadcasting the captioned ABC Evening News—but only at

11:30 P.M., with a repeat at 6:30 A.M. the next morning.

That at the present time, the deaf and hearing impaired are still being effectively excluded from the enjoyment of public television.

The undersigned declares, under penalty of perjury, that the foregoing is true and correct.

Executed at Los Angeles, California, on September 18, 1979.

/s/ Marcella M. Meyer
MARCELLA M. MEYER

Marcella M. Meyer
9150 East Florence Avenue, #216
Downey, California 90240
Work: (213) 383-2220, Voice or TTY
Home: (213) 923-3300, TTY

PERSONAL DATA

Date of Birth: May 14, 1925

Place of Birth: Kansas City, Missouri

Marital Status: Married

EDUCATION

Adult Education, Standard California Teaching Credential, California State University, Los Angeles.

PROFESSIONAL

1975-present Executive Director of Greater Los Angeles Council on Deafness, Inc. Administers GLAD-INFO Interpreter Pool, Information and referral services. Educates social service agencies, professionals and general community on the needs of the deaf and hearing impaired. Develops advocacy services. In October, 1977, organized South Central GLAD Outreach office, which primarily serves the minority deaf and underprivileged population. Established the Southern California Center for Law and the Deaf in December, 1977, which serves as a legal arm for GLAD-INFO and serves the deaf community in problems that are discriminatory in nature. In January, 1978, was instrumental in negotiations which resulted in Community Services for the Deaf becoming another component of GLAD-INFO.

1974-1975 In cooperation with Information and Referral Services of Los Angeles County, INFO, in a fulltime volunteer capacity, established the GLAD-INFO office, providing hearing impaired clients with information and referral services through walk-in and TTY (telephone-teletypewriter) service. Was instrumental in writing a proposal that resulted in GLAD-INFO receiving an Innovation and Expansion grant, enabling deaf persons to receive free interpreting services.

1970-1975 Assistant to the Coordinator of Special Services to the Hearing Impaired, La Puente Valley Vocational School. Served in several capacities, primarily in the area of individualized instruction for deaf persons seeking high school diplomas. Developed a testing system for the deaf for placement in grade level.

OTHER EMPLOYMENT

1955-1970	Variety of work experiences, including clerical, tutoring, and manufacturing of electrical components. Prior to 1955, and intermittently thereafter, was involved in management and overseeing of family restaurant business.

ORGANIZATION OFFICES HELD

1977-	GLAD representative, American Coalition of Citizens with Disabilities.
1973-1975	Treasurer, Southern California Registry of Interpreters for the Deaf, SCRID.
1969-1970	President, Long Beach Chapter, California Association of the Deaf, CAD.
1967-1969	Secretary, Long Beach Club of the Deaf.
1965-1966	Secretary, International Catholic Deaf Association, Kansas City Chapter.
1964-1965	Secretary, Kansas City, Kansas Deaf Center.

MEMBER, ADVISORY BOARD

1978-	El Camino College, Hearing Impaired Program.
1977-1978	Pasadena City College, Hearing Impaired Program.
1977-1978	Southwest College, Hearing Impaired Program.
1976-1977	Los Angeles City Council for the Handicapped.
1975-1977	Hear-More Institute, Orange, California.
1975-1976	Los Angeles Trade Technical College, Hearing Impaired Program.
1973-1975	Mental Health Program for the Deaf, Resthaven Psychiatric Hospital, Los Angeles.

BOARD MEMBER

1976-	Information and Referral Services of Los Angeles County, INFO.

PLAINTIFF'S EXHIBIT 4

'ROTEST MARCH!
FOR CAPTIONED T.V.

WHERE: AT GREATER L.A. PRESS CLI
600 NORTH VERMONT AVE.
LOS ANGELES, CALIF.

DATE: MAY 16th on MONDA

TIME: 9:00 A.M. SHARP

VHY: TO PROTEST, MARCH AND DEMANI
CAPTIONED T.V. FROM STATION K(

(WHAT MAKE YOUR OWN "PROTES
O BRING: STATEMENTS AGAINST KCE
(CHANNEL 28) FOR YOUR
PICKET POSTER.

LOOK ! ! !

PROTEST MARCH ENDS AT KCET STATIO
4401 Sunset Blvd., Hollywood, CA. for thos
protesters who want to come later than 9 A.I

ROTEST!!!PROTEST!

FACT SHEET

KCET received $3,277,176 in Federal funds.

According to the Rehabilitation Act of 1973, Rules and Regulations 504: No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

ABC makes captioning available to other community stations in the United States. These stations provide captioned programs in sufficient quality to the satisfaction of deaf viewers.

KCET as a public broadcasting station is not serving the deaf in the Los Angeles Area (which has the largest concentration of the deaf population) at a comparable degree as the other public service stations.

KABC has said that they will make their 7 p.m. daily news broadcast available to KCET between the hours of 8:00 to 11:00 p.m. KCET will be broadcasting the captioned version—but at the unreasonable hours of 11:30 to midnight, and, a day late, at 6:30 to 7:00 a.m. the following morning.

We demand that KCET provide the deaf with more captioned programs.

DEAF PEOPLE PAY TAXES, PAY THE SAME FOR THEIR TV SETS AS NON-DEAF, BUT RECEIVE MUCH LESS FROM TV PROGRAMS.

DEAF PEOPLE ARE ENTITLED TO EQUALITY ON TV. KCET IS A PUBLIC BROADCASTING COMPANY. DEAF PEOPLE MUST BE EQUALLY SERVED!!

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV 78-4715-R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., a California nonprofit corporation, ET AL., PLAINTIFFS

v.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA doing business as KCET, ET AL., DEFENDANTS

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, JAMES L. LOPER, WILLIAM J. LAMB, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

* * * *

VI. PRIMARY JURISDICTION OVER THIS CLAIM RESTS WITH THE PROPER ADMINISTRATIVE AGENCY

The doctrine of primary jurisdiction also bars plaintiffs from maintaining this action against the private defendants. That doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63 (1956). Even when a complaint is within a court's jurisdiction, it may be appropriate for the court to exercise its discretion to refer the matter to an agency for initial determination. Such a procedure ensures "uniformity and consistency" in an area of regulation entrusted to a particular agency and permits the initial resolution of underlying issues by agencies "that are better equipped than courts [to do so] by specialization, by insight gained through experience, and by more flexible procedure." *Far Eastern Conference* v. *United States*, 342 U.S. 570, 575 (1952). And, as the Supreme Court has only recently noted, the doctrine is particularly applicable in a case involving technical or technological questions uniquely within the expertise of the agency. *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976); *see Southeastern Community College, supra*, at 4693. For these reasons, at least one court has stayed a Section 504 action on the basis of the primary jurisdiction doctrine. *Drennon* v. *Philadelphia General Hospital, supra.*

In the instant case, the primary jurisdiction doctrine is especially important. Not only has Congress stressed the need for uniformity in the implementation of Section 504, but the application of that statute to this type of claim against a public television station also raises a number of policy questions which have traditionally been handled by agencies with expertise in the field.

The FCC is responsible for regulating and licensing all broadcast stations, including public broadcast stations, in accordance with the mandate of the Communications Act that they operate in the public interest. Under that Act, all broadcast licensees, including public broadcast stations, must ascertain and serve the needs of the various groups and elements which make up their broadcast service area. Balancing conflicting needs and interests is left to the good faith judgment of the station licensee under the statutory scheme established a half century ago. Given the nature and costs of captioning and other techniques required to make the aural portion of television broadcasts available to the hearing-impaired, and given the potential adverse impact of those techniques on viewers without hearing impairments, any requirement to provide captions or to employ other techniques to serve the hearing-impaired audience would necessarily preempt part of the judgment left to the licensee by the Communications Act and affect the licensee's ability to fulfill its Communications Act responsibilities. Thus, the question posed by plaintiffs in this case is particularly appropriate for decision by the FCC as to whether the "public convenience, interest, or necessity" is being served. 47 U.S.C. 303.

Indeed, the FCC has already been active in this area. In 1970, the Commission issued a Public Notice to all television licensees advising them of certain special needs of the hearing-impaired. *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 27 F.C.C.2d 917 (1970). In 1976, the Commission required television licensees to broadcast emergency information both

orally and visually or only visually. *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 F.C.C.2d 18 (1976), *reconsideration granted*, 62 F.C.C.2d 565 (1977).[46]

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[46] More recently, the Commission opened an inquiry into the telecommunications needs of the deaf and hearing-impaired to provide an opportunity for communications common carriers and other vendors of communications-related equipment to work with the hearing-impaired community in order to better understand its communications needs and to help formulate policies and rules on the subject. F.C.C. Common Carrier Docket No. 78-50 (February 8, 1978).

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Corporation for Public Broadcasting

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV 78-4715-R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.,
a California nonprofit corporation, ET AL., PLAINTIFFS

v.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA
doing business as KCET, ET AL., DEFENDANTS

PRIVATE DEFENDANTS' PROPOSED FINDINGS OF FACT, STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE, AND PROPOSED CONCLUSIONS OF LAW

As stated in the private defendants' Motion for Summary Judgment, the private defendants' Proposed Findings of Fact also constitute the private defendants' Statement of Material Facts as to Which There Is No Genuine Issue.

PRIVATE DEFENDANTS' PROPOSED FINDINGS OF FACT AND STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

The Plaintiffs

1. Plaintiffs Sue Gottfried and Marcella M. Meyer are deaf or hearing-impaired persons, residing in Los Angeles County, within the Central District of California.

KCET

2. The defendant, Community Television of Southern California (hereinafter CTSC), is a nonprofit corporation, organized and existing under the laws of the State of California since 1962. At all times since September 28, 1964, CTSC has operated a noncommercial educational television station, KCET, in Los Angeles, California, under licenses and other authorizations granted by the Federal Communications Commission.

3. KCET's viewing area encompasses Los Angeles, Orange, and Ventura Counties and parts of Riverside and San Diego Counties.

4. The defendant James L. Loper has been President and Chief Executive Officer of CTSC since January 1977.

5. The defendant William J. Lamb is and, at least since on or about January 1977, has been the Senior Vice-President and General Manager of CTSC.

6. KCET is a local television station, servicing its own viewing area, with programs it produces itself as well as programs acquired through the Public Broadcasting Service and from other sources. KCET is also a major producer of national programming made avail-

able to the Public Broadcasting Service and other public television stations throughout the United States.

7. In fiscal year 1977 (July 1, 1976-June 30, 1977), KCET's total revenues were $13,395,984.

(a) Of that amount, $7,630,323 or 57 percent was received in the form of restricted program grants as follows:

Federal Agencies		
National Institute Education	$958,537	(Program Production)
National Endowment Arts	337,017	(Program Production)
National Endowment Humanities	7,751	(Program Production)
	$1,303,305	(10% of total revenues)
Public Television Agencies		
Corporation Public Broadcasting	$1,171,184	(Program Production)
	42,743	(Research and Development)
	$1,213,927	(9% of total revenues)
Public Broadcasting Service	$721,481	(Program Production)
	70,000	(Program Rights Acquisition)
	26,000	(R & D)
	$817,481	(6% of total revenues)
Corporations	$2,814,196	(21% of total revenues)
Foundations	$1,481,414	(11% of total revenues)

(b) Of that amount, $742,166 or 6 percent was received in the form of facilities grants as follows:

Public Television Agencies		
Public Broadcasting Service	$552,624	(Network Delay Services)
Other PTV Stations	24,191	(Production Services)
	$576,815	(4% of total revenues)
Other Sources	$165,351	

(c) Of that amount, $1,200,000 or 9 percent was received in the form of general operating grants as follows:

Corporation Public Broadcasting	$1,150,000	(Community Service Grants: Local Program Activities) (8.6% of total revenues)
Other	$ 50,000	

(d) Of that amount, $3,688,011 or 28 percent was received in the form of other private contributions and subscriptions as follows:

Subscriptions	$2,520,479	(19% of total revenues)
Contributions	$1,167,532	(9% of total revenues)

(e) The material contained in paragraphs 6(a) through 6(c) reveals that during fiscal year 1977, KCET received $2,363,927 from the Corporation for Public Broadcasting and $1,370,105 from the Public Broadcasting Service.

8. In fiscal year 1978 (July 1, 1977-June 30, 1978), KCET's total revenues were $13,864,861.

(a) Of that amount, $7,853,672 or 57 percent was received in the form of restricted program grants as follows:

Federal Agencies		
National Institute Education	$1,814,090	(Program Production)
National Endowment Arts	461,872	(Program Production)
National Endowment Humanities	18,243	(R & D)
U.S. Information Agency	3,955	(Program Distribution)
	$2,298,160	(17% of total revenues)
Public Television Agencies		
Corporation Public Broadcasting	$1,032,177	(Program Production)
	204,038	(Program Packaging)
	44,806	(R & D)
	$1,281,021	(9% of total revenues)

Public Broadcasting Service	$318,847	(Program Production) (2% of total revenues)
Corporations	$2,974,138	(22% of total revenues)
Foundations	$981,506	(7% of total revenues)

(b) Of that amount, $432,039 or 3% was received in the form of facilities grants as follows:

Public Television Agencies		
Public Broadcasting Service	$176,382	(Network Delay Services)
Other PTV Stations	26,381	(Production Services)
	$202,763	(1.5% of total revenues)
Other Sources	$229,276	

(c) Of that amount, $1,534,109 or 11 percent was received in the form of general operating grants:

Corporation Public Broadcasting	$1,450,335	(Community Service Grants: Local Program Activities)
	10,024	(Training Grants)
	$1,460,359	(10.5% of total revenues)
California Public Broadcast-casting Commission	$24,950	(Local Program Activities) (.2% of total revenues)
Other	$48,800	

(d) Of that amount, $3,874,932 or 28 percent was received in the form of other private contributions and subscriptions as follows:

Subscriptions	$2,590,621	(19% of total revenues)
Contributions	$1,284,311	(9% of total revenues)

(e) The material contained in paragraphs 7(a) through 7(c) reveals that during fiscal year 1978, KCET received $2,741,380 from the Corporation for Public Broadcasting and $495,229 from the Public Broadcasting Service.

• • • •

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Number CV 78-4715 R

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., etc., ET AL., PLAINTIFFS

vs.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA DBA KCET, ET AL., DEFENDANTS

PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS' COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, JAMES L. LOPER, WILLIAM J. LAMB, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING, MOTION FOR SUMMARY JUDGMENT

Date: November 5, 1979

Time: 10:00 A.M.

Courtroom: 14

* * * *

III. DEFENDANTS' ERRONEOUS STATEMENT OF THE CASE

The defendants contend that this suit is one of three intertwined actions which plaintiffs, *or their counsel*,[1] have launched in an attempt to compel the captioning of public broadcasting programs.

The purpose of alluding to the said proceedings is to attempt to "muddy the waters" since the defendants are well aware that the parties are not identical, nor were the issues the same.

As a matter of record—and this is particularly significant with respect to the defendants' later arguments about the plaintiffs failure to exhaust administrative remedies and the doctrine of primary jurisdiction—KCET's counsel in those "intertwined" proceedings successfully contended:

> [T]he Commission [FCC] is not an appropriate forum for the adjudication of Rehabilitation claims. (Opposition to "Petition to Deny Renewal of License, p. 13).

Consistency does not seem to be one of the defendants' virtues.

The so-called "intertwined" proceedings referred to relate to the renewal of the licenses of KCET and seven commercial television stations. There was no issue as to

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[1] Plaintiffs are unable to understand whether these defendants are contending that plaintiffs are bound by the action of their counsel in other proceedings. If this is indeed their assertion, plaintiffs respectfully invite the attention of the Court to the fact that the counsel for the defendants COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, LOPER and LAMB, viz., Messrs. Covington & Burling, were counsel for the National Federation of the Blind, et al., in the case of *Adams, et al.* v. *Califano, et al.* (D.C. Dist. of Col.) Civil Action No. 3095-70 and 74-1720, wherein with respect to Section 504, they successfully asserted a completely opposite position to that which they are here asserting on behalf of the instant defendants, and were awarded attorneys fees by the Court as attorneys for the prevailing parties.

the obligations of a public broadcast station as distinguished from those of commercial stations. The sole issue was whether the stations had violated the FCC regulations. FCC ruled that it had no regulations requiring stations to regularly broadcast their programs for the deaf and hearing impaired, and the enforcement of Section 504 of the Rehabilitation Act was not one of its duties.

None of the constitutional issues here involved were involved in that case, nor was the issue raised that the FCC had the duty to *issue regulations* to insure that *the constitutional rights* of the deaf and hearing impaired were protected. The FCC was not a defendant, nor was HEW, CPB, PBS or the CPBC. Neither was Marcella Meyer a plaintiff, and the defendant KCET successfully had the Greater Los Angeles Council on Deafness, Inc. eliminated as a petitioner in those proceedings.

There was also no issue as to whether HEW had or should issue regulations with reference to the public broadcasting industry.

Under no circumstances could any proceeding—particularly those referred to—have any bearing on the constitutional and statutory rights of the plaintiffs as they relate to public television, the subject of this lawsuit.

The defendants' reference to the complaint filed by counsel for the plaintiff with HEW is even more remarkable. As the defendants' reference shows, the complaint was filed March 13, 1978, over 19 months ago, and has not even been acted upon (and another complaint against KQED of San Francisco, as has been shown in other proceedings in this case, was dismissed by HEW because it had no policy on the subject of public broadcasting).

As a matter of record herein, HEW was requested two continuances in which to file a Motion for Summary Judgment and/or respond to the motions on file because it was trying to make up its mind as to whether it even had a policy on the subject.

Lastly, counsel for HEW was orally informed the Court that no administration remedies in this case need be exhausted nor does HEW want primary jurisdiction.

How, in the face of all the foregoing, the defendants have the temerity to ask this Court to decline jurisdiction on the grounds that the plaintiffs have not exhausted their administrative remedies and that the doctrine of primary jurisdiction should be observed (Defendants' Memorandum, Points V and VI, pp. 73 and 76) is beyond understanding.

IV. PUBLIC BROADCASTING EFFORTS BY THESE DEFENDANTS TO PROVIDE TELEVISION TO THE HEARING IMPAIRED HAS BEEN PITIFUL

A. KCET

The defendant KCET has refused to supply an information as to its activities in this field prior to 1977.

We have previously adverted to the fact that the defendants HEW and PBS have made the captioned ABC Evening News available to KCET free of charge since 1973. (Defendants' Wells' affidavit, p. 30, para. 13).

KCET was well aware of the fact that the deaf and hearing impaired had access to no other news program in its viewing area.

As of January 31, 1977, KCET still did not think it important enough to broadcast that program, being one of the very few public broadcasting stations that took that attitude. (See *Exhibit 1*, p. 11, *"Now See This: A Survey of TELEVISION STATIONS Programming for DEAF VIEWERS", 1977*, Public Service Programs, Gallaudet College, Washington, D.C. 20002). Yet the program was broadcast by KQED in San Francisco, and by tiny stations in Eureka, Redding, Sacramento, San Bernardino and San Jose. (*Id.* p. 11). In Southern California, a deaf person would have to go to San Bernardino to get the news by television.

This seems difficult to understand, particularly since the program cost this defendant nothing, and that since

1974 counsel for plaintiffs was urging the station to broadcast the program, by telephone and by correspondence, which efforts continued through 1977 (See *Collective Exhibit 2*). The trumped up excuses which this defendant used to avoid this responsibility indicates its true attitude towards the problem. It was only after the picketing of the station and the impending necessity to have its license renewed that it grudgingly decided to broadcast the program—and then at times which it knew put an intolerable burden on the deaf and hearing impaired.

IT IS NOT TOO EARLY IN THIS REPLY TO INVITE THE COURT'S ATTENTION TO THE FACT THAT DESPITE ALL OF THE TRUMPETING WITH RESPECT TO THE "CLOSED CAPTIONING PROJECT", THE DEAF AND HEARING IMPAIRED ARE STILL NOT ASSURED THAT THE DEFENDANT, KCET, WOULD OR WILL BROADCAST THOSE CLOSED CAPTIONED PROGRAMS, EXCEPT UNDER THE COMPULSION OF AN ORDER OF THIS COURT.

According to the defendant, Loper (Declaration, p. 4, lines 4-10):

> [KCET] must reserve the right to (1) reject or refuse to broadcast any captioned program received from PBS which KCET reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest and (2) substitute a program which, in KCET's opinion, is of greater local or national importance.

As shown above, from 1973 to May 1977, KCET refused to broadcast the Captioned ABC Evening News, despite the importance of the news to the deaf and hearing impaired. What, may one ask, was there about that program that was "unsatisfactory, unsuitable or contrary

to the public interest"? And how did it, all of a sudden, lose that status in May 1977? Or what programs of greater local or national importance were substituted for it?

Moreover, when it was broadcast, why did KCET select 11:30 P.M. and 6:30 A.M., instead of broadcasting it at a reasonable hour, between 8:00 P.M. and 11:00 P.M.? And even then, why was it on many occasions broadcast at midnight or later—or not at all—being preempted by programs of such significance as one dealing with the stomach larvae of sea urchins?

And this same callous treatment existed with respect to other programs. To catalogue the instances would itself fill a book. But just one is sufficient. PBS furnished the movie "Scenes From A Marriage" to all its members, including KCET, in both captioned and uncaptioned versions. All public television stations *except KCET* broadcast each version on alternate evenings. KCET refused to broadcast the sub-titled version at all—and when this was brought to its attention, it claimed that this was due to "programming conflicts"!

Is this the type of exercise of discretion that the deaf and hearing impaired are to be expected to live with on a voluntary, unsupervised basis?

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V

SECTION 504 GIVES PLAINTIFFS A PRIVATE RIGHT OF ACTION. MOREOVER, SO DOES THE CONSTITUTION.

Plaintiffs have discussed this issue at length in their Brief in Support of their Motion for Summary Judgment (p. 156), and incorporate that material by reference herein.

Suffice it to say, Congress in 1978 provided that the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 were applicable to persons

aggrieved under Section 504. *Cannon* v. *University of Chicago*, 99 S.Ct. 1946 (1979) has settled the question of a private right of action to enforce the provisions of Title VI. This is consistant with the legislative history.

VI

PLAINTIFFS HAVE NO ADMINISTRATIVE REMEDIES TO EXHAUST. THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT APPLY IN THIS CASE.

These identical issues and the same arguments were raised by the defendants in their Motion to Stay Proceedings filed by the defendants, COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, LOPER and LAMB, and joined in by defendants, PUBLIC BROADCASTING SERVICE and CORPORATION FOR PUBLIC BROADCASTING. The Court denied the Motion to Stay.

It is difficult to reconcile the defendants' insistance (See their Points V and VI) that plaintiffs must resort to either HEW and/or the FCC for relief, with their arguments, under Points II and III of their Memorandum, that no Federal department or agency has jurisdiction over their activities nor can tell them what to do. If those arguments are correct, then resort to HEW and the FCC would be an exercise in futility.

Their argument that a resort to these administrative agencies or that these agencies have primary jurisdiction, is in error.

The Department of Justice—who should be the best judge of whether or not administrative remedies are available or whether any governmental agency has primary jurisdiction, orally informed this Court that plaintiffs did not have to exhaust administrative remedies, and that there was no question of primary jurisdiction. This position was similarly taken in the Brief filed by the Solicitor General in *Cannon* v. *The University of Chi-*

cago, supra, and recognized by the Supreme Court in that case.

HEW, through the Solicitor General, advised the Court that there were no administrative remedies that the plaintiff had to exhaust and that the Government perceived no interference with HEW's enforcement procedures, by permitting the plaintiff to go directly to the Court.

Although that case involved Title IX, the Court stated it was modelled on Title VI (the title specifically incorporated in Section 504 in 1978). On p. 1962-3, footnote 41, the Court notes:

> . . . No matter how narrowly that provision is read, it certainly envisions private enforcement suits apart from the administrative procedures that Title VI, like Title IX, expressly creates. If such suits would not hamper administrative enforcement of Title VI against local and state school officials, it is hard to see how they would do so with respect to other recipients of federal funds.
>
> • • • •
>
> For these same reasons, we are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies. Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion . . .

The Court stated, p. 1962-3:

> The Department of Health, Education and Welfare, which is charged with the responsibility for administering Title IX, perceives no inconsistency between the private remedy and the public remedy.[41] On the contrary, the agency takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes. See n.8, *supra*. The agency's position is unquestionably correct.[42]
>
> • • • •

EXHIBIT 1

NOW SEE THIS:

A Survey of Television Stations Programming for Deaf Viewers

Revised SPRING 1977

Public Service Programs
Gallaudet College
Washington, D.C. 20002

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PBS STATIONS BROADCASTING CAPTIONED VERSIONS OF ABC EVENING NEWS 11

Prepared by:

PUBLIC SERVICE PROGRAMS
Gallaudet College
Washington, D.C.

INTRODUCTION

In December 1971, Public Service Programs published a brief listing of those television stations known to be offering programs, interpreted or captioned, for deaf people. This listing was developed after a search through news clipping files and letters received from interested persons or agencies reporting such services in their locale.

For deaf people the existence of interpreted or captioned news or even visual emergency warnings is so significant that a more accurate assessment of the nature and extent of such services was mandatory. To get a more precise indication of television services of benefit to deaf viewers, Public Service Programs undertook a telephone survey of each commercial television station in the United States. The results of that survey were published in March 1974 in the booklet, "Now See This: A Survey of Television Stations Programming for Deaf Viewers."

The same direct telephone approach was used for this recent survey. The survey was begun in November 1976; the final call was completed in early February 1977. Within that short time period two rulings by the Federal Communications Commission were effected which altered the television picture. For discussion of these decisions see pages vii-viii.

This revised survey should prove helpful to various groups interested in serving hearing-impaired citizens and others who might benefit from a visual presentation of information on television. As with our previous reports, this survey attempts:

1) to determine the current status of commercial television programming for deaf and hearing-impaired viewers;

2) to enable station managers to compare their services (or lack of them) for deaf citizens with those of other stations;

3) to encourage the sharing of information on programs and techniques;

4) to provide organizations serving the hearing-impaired with information on available programming, and a basis for extending existing programming or initiating new programming.

Collecting Information

The information in this listing was provided directly by station personnel in response to three basic questions:

1) Does your station use captioning?

2) Does your station use sign language interpreters?

3) Has your station presented public service programs for the hearing and/or deaf public about hearing loss and deafness?

From that starting point the interviewer could then elicit specific information: What specific programs? Are they locally produced? While some respondents were able to identify current programs, others described programs which had been discontinued previous to this second survey. Still others described programs in the planning which were not yet being broadcasted. Many station respondents were interested in the concept of offering services for deaf viewers, but depended on the network for their input. Others felt that there are too few deaf persons in their locale to warrant specific programming. In a few cases, stations cited attempts to provide programs for deaf viewers. Having received no response from deaf viewers about these offerings, the stations dropped the programs.

Categorizing and Coding

For consistency it was decided that the categories for this revision would remain identical to those in the original telephone survey. However, a Federal Communications Commission ruling, effective February 1, 1977, intervened. It stated that a legible message conveying the essential information of emergency announcements be

transmitted for the benefit of the hearing-impaired and other visually dependent members of the audience.

This very effectively brought to 100% the potential listings for this survey in categories 1 and 2. *All* stations had to provide emergency bulletins in some visible mode. Rather than list every station called, we have chosen to eliminate the first two categories from this listing. As "dead" categories, 1 and 2 will not appear even when a station is listed as offering other program services. To be eligible for inclusion in this survey, then, stations must offer services in one or more of the following categories:

3) Captioned weekday news;

4) Interpreted weekday news *;

5) Public affairs programs interpreted/captioned for deaf viewers;

6) Public affairs programs about deafness;

7) Syndicated and network programs featuring deaf actors or interpreters for deaf viewers.

The code numbers have been kept consistent with those of the 1974 survey for ease of comparison.

While categories 3 and 4 are clear cut, the remaining three categories are less precise. Public affairs programs (categories 5 and 6) by their nature tend to be one-time features or short series—at least those on deafness, or

---

* Interpreted news programs may be presented either by deaf newscasters or by skilled interpreters for deaf people. The presentation of the news is in a simultaneous mode—the deaf person or interpreter signs the news in American Sign Language while *at the same time* the station's regular newscaster reads the news. In this way, deaf viewers see the news, while hearing viewers hear the announcer's voice. There are some deaf newscasters who sign and speak for themselves simultaneously. Whatever technique is chosen, the ues of deaf newscasters is an important concept. Of the stations which reported news offerings interpreted for deaf viewers, nine feature deaf newscasters.

those which provide interpreting or captioning. Because public awareness is important, we have included these categories in the listing even though the actual program in question might have been a one-time offering. Such a listing indicates the willingness of the station to give time to the topic of deafness and/or to provide deaf viewers with access to public affairs programming. One interesting finding of this recent survey is the significant increase in the number of stations which have offered a public affairs program on deafness for the *general public.** In 1974, 33 stations reported such an offering.

During this survey, 268 stations indicated that they had carried a program which gave public affairs coverage to deafness and hearing loss. Thus, category 6 is the largest category, after, of course, visual emergency bulletins. Ironically enough, this type of programming reaches the hearing audience, unless, as with "The Invisible Handicap," a 20-minute segment which appeared on CBS's *60 Minutes* program in November, an interpreter appears in an insert on the screen, or the program is captioned.

It is impossible for us to list the individual programs that comprise the final category—nationally syndicated or network programs. A number 7 following a local station entry indicates that the station is broadcasting one (or more) of the following programs:

"Christopher Close-ups"

"Light Unto My Path"

"Old Time Gospel Hour"

"The Deaf Hear"

"The Jerry Farwell Show"

"Vision On"

---

* We would suggest that you call your local station if you wish to verify program specifics.

Also included in this category is "Sesame Street" which has featured a young deaf actress in its segments. Her frequent visits have proved so popular that she has been given permanent status as a resident of Sesame Street.

A NOTE ON PBS AND CATV

Through major funding support from the Bureau of Education of the Handicapped of the United States Office of Education, the Public Broadcasting Service has undertaken numerous projects that are helping to make television for hearing-impaired viewers a reality. In close cooperation with BEH, Boston's PBS affiliate, WGBH-TV, undertook the captioning of "The French Chef" in 1971. Fifty-two programs in that series have been captioned.

In 1973 WGBH-TV initiated the captioning of the ABC Evening News with Harry Reasoner and Howard K. Smith. When our 1974 survey appeared the ten PBS stations televising the captioned ABC Evening News were listed. As of January 31, 1977, the list of PBS stations carrying this program stands at 118 stations in 34 states and the District of Columbia.* There are, in addition, many areas which get the program via cable TV from one of the PBS station carriers. The WGBH-TV Caption Center does not know which cable companies pick up the captioned news; they *do* know that the program is seen extensively in Canada on cable TV. For the list of PBS stations carrying the ABC Captioned News, see pages 11-14.

In our 1974 survey, mention was made of the National Cable Cooperative for Deaf Viewers. Since the Cooperative is no longer operating, we cannot report on its activity.

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* This information was provided by Mr. Jeff Hutchins, Producer, ABC Captioned News, WGBH-TV Caption Center.

THE FCC RULINGS

Since the two recent decisions of the Federal Communications Commission have distinct relevance to this survey, we are including brief restatements of these decisions for our readers.

Order *re* visible transmission of emergency bulletins, effective February 1, 1977:

> A licensee is required to transmit an emergency message upon activation of the EBS (Emergency Broadcast System) during a National-level Emergency. At all other times, emergency bulletins are transmitted at the sole discretion of the licensee. The type of visible message is left also to the discretion of the licensee. Part 73 of the FCC Rules and Regulations has been amended by the recent decision (released January 28, 1977), Section 5 of which states: "We also stress that because not all persons with impaired hearing understand sign language, the use of only sign language or symbols is not sufficient to fulfill the intent of the new requirements. A legible message conveying the essential information is required. Methods which may be used include, but are not necessarily limited to, electronic captioning, manual methods (e.g., handprinting), slides, or mechanical printing processes. The use of sign language symbols may be used to supplement, but not supplant, the other methods."

Order of the FCC *re* closed captioning, effective March 1, 1977:

> The amendment to FCC rules was taken in response to a petition filed by the Public Broadcasting Corporation to permit "closed" captioning of television programs for the benefit of the hearing impaired.
>
> The FCC order states, in part, that Subpart E, Part 73, of the Commission's Rules and Regulations is amended to read:

(a) (22) (c) All of Line 21, Field 1, and the first half of Line 21, Field 2, may be used for the transmission of a program related data signal, which, when decoded, provides a visual depiction of information simultaneously being presented on the aural channel . . .

(a) (22) (c) The use of Line 21 for transmission of other data signals conforming to other formats may be used subject to prior authorization by the Commission.

This decision does not make captioning obligatory. Each licensee determines how best to serve this public. The decision does not reserve Line 21 exclusively for captioning-for-the-deaf; this flexibility will permit later development of Line 21 for transmission of weather information, standard time, sports headlines, stock market quotations, teletex services, etc., which should be of benefit to all viewers, the deaf included. The Commission notes its concern that decoding equipment will be expensive for the consumer, estimates varying from a low of $100 to a high of $300. By not restricting Line 21 to a single use, the demand should ultimately be broader, thus enabling manufacturers to offer decoding devices at lower costs to consumers.

NUMBER OF STATIONS BY CATEGORY

Code Number	Type of Programming	Number of Stations
1	Captioned emergency bulletins)	—dead categories
2	Interpreted emergency bulletins)	
3	Captioned weekday news	5
4	Interpreted weekday news	43
5	Public affairs programs interpreted/captioned for deaf viewers	104
6	Public affairs programs about deafness for general audiences	275
7	Syndicated and network programs featuring deaf actors or interpreters for deaf viewers	116
Total number of stations listed		402

LISTINGS: ENTRIES IN ALPHABETICAL ORDER BY STATE

STATE	CITY	TV STATION	PROGRAMMING
ALABAMA	Anniston	WHMA	7
	Birmingham	WAPI	5
		WBMG	5
		WBRC	4
	Dothan	WTVY	7
	Mobile	WALA	7
		WKRG	5
	Montgomery	WSFA	6
ARIZONA	Flagstaff	KOAI	5, 7
	Phoenix	KPHO	6
		KTAR	6
		KTVK	6
ARKANSAS	Jonesboro	KAIT	7
	Little Rock	KARK	6
		KATV	6
		KTHV	6
CALIFORNIA	Bakersfield	KERO	6
	Chico	KHSL	7
	El Centro	KECC	5
	Fresno	KFSN	5
		KMJ	6
	Hollywood	KCOP	6, 7
		KTLA	6
	Los Angeles	KBSC	6
		KNXT	6
	Modesto	KLOC	6, 7
	Oakland	KTVU	6
	Palm Springs	KMIR	7
	Sacramento	KCRA	6
		KOVR	7
		KTXL	6
		KXTV	6
	Salinas	KSBW	7
	San Diego	KCST	6
		KFMB	6
		KGTV	6
	San Francisco	KBHK	6
		KGO	6
		KRON	4, 6
	Santa Barbara	KEYT	6
	Santa Maria	KCOY	6, 7

STATE	CITY	TV STATION	PROGRAMMING
COLORADO	Colorado Springs	KKTV	5
		KRDO	7
	Denver	KBTV	6
		KOA	6
		KWGN	6
	Grand Junction	KREX	7
CONNECTICUT	Hartford	WFSB	4, 7
		WHCT	7
	New Haven	WTNH	5, 6
	Waterbury	WATR	6
	West Hartford	WHNB	5, 6
DISTRICT OF COLUMBIA		WDCA	6
		WMAL	4, 6
		WTOP	4, 5
		WTTG	4, 6
FLORIDA	Daytona Beach	WESH	5
	Dania	WKID	7
	Fort Meyers	WBBH	6, 7
		WINK	6
	Jacksonville	WJKS	6
		WJXT	4
		WTLV	6
	Miami	WCIX	7
		WCKT	7
		WTVJ	6
	Orlando	WDBO	6
	Palm Beach	WPTV	6
	Panama City	WJHG	6
	Pensacola	WEAR	5
	Sarasota	WXLT	6
	St. Petersburg	WLCY	6
		WTOG	6
	Tampa	WTVT	6
GEORGIA	Atlanta	WAGA	6
		WQXI	6
		WSB	4, 7
		WTCG	5
	Augusta	WJBF	6
	Columbus	WRBL	5, 6
		WTVM	6
		WYEA	7
	Macon	WMAZ	5, 6
	Savannah	WTOC	6

STATE	CITY	TV STATION	PROGRAMMING
IDAHO	Twin Falls	KMVT	6
ILLINOIS	Champaign	WCIA	7
		WICD	6
	Chicago	WBBM	6
		WCIU	6
		WFLD	6
		WLS	6
	Creve Coeur	WRAU	5
	Decatur	WAND	6
	Harrisburg	WSIL	7
	Moline	WQAD	6
	Peoria	WMBD	6, 7
	Quincy	KHQA	6
		WGEM	6, 7
	Rockford	WCEE	6
		WREX	6
		WTVO	7
	Rock Island	WHBF	6
	Springfield	WICS	6
INDIANA	Elkhart	WSJV	6
	Evansville	WFIE	4, 5, 6
		WTVW	6
	Fort Wayne	WANE	6, 7
		WKJG	6
		WPTA	5, 6
	Indianapolis	WLWI	6
		WRTV	4
		WTTV	6, 7
	Lafayette	WLFI	6,7
	South Bend	WNDU	4, 6
		WSBT	6
	Terre Haute	WTHI	6
		WTWO	6, 7
IOWA	Ames	WOI	6, 7
	Cedar Rapids	KCRG	5, 6
		WMT	5, 6
	Davenport	WOC	6, 7
	Des Moines	KRNT	6
		WHO	6
	Fort Dodge	KVFD	6, 7
	Mason City	KGLO	6
	Ottumwa	KTVO	5
	Sioux City	KCAU	6
		KMEG	6

STATE	CITY	TV STATION	PROGRAMMING
IOWA (continued)	Sioux City	KTIV	6, 7
	Waterloo	KWWL	6
KANSAS	Dodge City	KTVC	7
	Hays	KAYS	6
	Topeka	KTSB	6
		WIBW	6
	Wichita	KAKE	6
		KARD	6
	N. Wichita	KTVH	6, 7
KENTUCKY	Bowling Green	WBKO	6, 7
	Hazard	WKYH	6, 7
	Lexington	WBLG	6
		WKYT	6
	Louisville	WAVE	6
		WDRB	6
		WHAS	6
		WLKY	6
	Paducah	WDXR	5
		WPSD	5
LOUISIANA	Alexandria	KALB	6
	Baton Rouge	WBRZ	6
	Lafayette	KATC	5, 6
		KLFY	4, 6
		KLNI	7
	Lake Charles	KPLC	6
	Monroe	KNOE	6
	New Orleans	WDSU	4, 6
		WGNO	5, 6
		WVUE	6
		WWL	6
		WYES	7
	Shreveport	KSLA	6
		KTAL	6, 7
		KTBS	5, 6
MAINE	Bangor	WABI	6
		WLBZ	6
	Portland	WCSH	5, 6
		WMTW	7
	Presque Isle	WAGM	6, 7

STATE	CITY	TV STATION	PROGRAMMING
MARYLAND	Baltimore	WBAL	5, 6
		WBFF	5, 6
		WJZ	4, 5, 6
		WMAR	6, 7
	Hagerstown	WHAG	5
	Salisbury	WBOC	6, 7
MASSACHUSETTS	Boston	WCVB	4, 6, 7
		WNAC	6
		WSBK	5, 6
	Springfield	WHYN	6, 7
		WWLP	6
	Worcester	WSMU	6
MICHIGAN	Birmingham	WXON	6, 7
	Cadillac	WWTV/UP	6, 7
	Detroit	WWJ	4, 6, 7
	Flint	WJRT	6
	Grand Rapids	WZZM	6, 7
	Jackson	WILX	6
	Kalamazoo	WKZO	6
	Marquette	WLUC	6, 7
	Saginaw	WEYI	3, 6
		WNEM	6
	Southfield	WJBK	6
		WKBD	6
		WXYZ	6
MINNESOTA	Alexandria	KCMT	6
	Austin	KAUS	6
	Duluth	KDAL	6
		WDIO	6, 7
	Mankato	KEYC	6, 7
	Minneapolis	KMSP	5, 6
		WCCO	6
		WTCN	6
	Rochester	KTTC	6
MISSISSIPPI	Biloxi	WLOX	6
	Greenwood	WABG	6
	Hattiesburg	WDAM	6
	Jackson	WAPI	6
		WJTV	6
		WLBT	6

STATE	CITY	TV STATION	PROGRAMMING
MISSISSIPPI (continued)	Meridian	WHTV	7
		WTOK	6, 7
	Tupelo	WTWV	6, 7
MISSOURI	Cape Giradeau	KFVS	6
	Jefferson City	KRCG	6
	Joplin	KODE	5, 6
	Kansas City	KBMA	6
		KMBC	6
	St. Joseph	KQTV	6, 7
	St. Louis	KMOX	5
		KPLR	6
		KSD	3, 6
		KTVI	6
	Springfield	KOLR	6
		KYTV	5, 7
MONTANA	Billings	KTVQ	4, 5, 6
		KULR	6
	Butte	KXLF	5, 6
	Glendive	KXGN	6
	Great Falls	KFBB	6
		KFTV	4, 5, 6
	Helena	KTCM	6, 7
	Miles City	KYUS	6
	Missoula	KGVO	6
NEBRASKA	Hastings	KHAS	6
	Kearney	KHOL	6
	Lincoln	KOLN	6
	N. Platte	KNOP	5, 6
	Omaha	KETV	6
		KMTV	6
		WWT	6
NEVADA	Henderson	KVVU	3, 6
	Las Vegas	KLAS	4,5 6
		KORK	4, 6
	Reno	KCRL	6
		KOLO	4, 6, 7
NEW HAMPSHIRE	Manchester	WMUR	6

STATE	CITY	TV STATION	PROGRAMMING
NEW MEXICO	Albuquerque	KGGM	6
		KOAT	5, 6
		KOB	5
NEW YORK	Albany	WTEN	6
	Binghamton	WBJA	6
		WBNG	6
		WICZ	6
	Buffalo	WBEN	6
		WGR	5, 6
		WKBW	6
	Elmira	WENY	4, 5
	Grand Island	WUTV	4, 6, 7
	Plattsburg	WPTZ	6, 7
	Rochester	WHEC	5, 6
		WOKR	4, 5, 6
		WROC	6
	Schenectady	WRGB	4, 6
	Syracuse	WHYS	6, 7
		WSYR	5, 6
	Utica	WKTV	7
	Watertown	WWNY	6, 7
NEW YORK CITY		WABC	5
		WCBS	6
		WNBC	6
		WNEW	6
		WNYC	5
		WPIX	6
NORTH CAROLINA	Asheville	WLOS	6, 7
	Charlotte	WBTV	6, 7
		WRET	6
		WSOC	4, 7
	Durham	WTVD	6
	Greensboro	WFMY	4, 7
	Greenville	WNCT	7
	High Point	WGHP	6
	Raleigh	WRAL	4, 7
	Washington	WITN	5
	Wilmington	WWAY	6, 7
	Winston-Salem	WXII	4, 5, 6
NORTH DAKOTA	Bismarck	KFYR	6
		KXMB	5, 6, 7
	Fargo	KTHI	7
		KXJB	6
		WDAY	7
	Minot	KXMC	7

STATE	CITY	TV STATION	PROGRAMMING
OHIO	Akron	WAKR	4, 5, 6, 7
	Cincinnati	WCPO	5, 6, 7
		WLWT	5
	Cleveland	WJW	5
	Dayton	WLWD	5, 7
	Lima	WLIO	5
	Toledo	WSPD	5, 6
OKLAHOMA	Ada	KTEN	5
	Tulsa	KOTV	5, 7
		KTUL	6
OREGON	Coos Bay	KCBV	3, 5, 6
	Eugene	KEZI	6
		KVAL	6
	Medford	KMED	7
		KOBI	6
	Portland	KATU	5
		KGW	4, 5
		KPTV	6
PENNSYLVANIA	Altoona	WTAJ	7
	Johnstown	WJAC	7
	Lancaster	WGAL	5, 6
	Lebanon	WLYH	7
	Philadelphia	WKBS	6
		WPVI	5, 7
	Pittsburgh	WTAE	6
	Scranton	WDAU	5, 6
RHODE ISLAND	Providence	WJAR	5, 6
SOUTH CAROLINA	Charleston	WCBD	6
		WCIV	6
		WCSC	5
	Columbia	WIS	7
		WOLO	6
	Florence	WBTW	6, 7
	Greenville	WFBC	4, 5, 6
	Spartanburg	WSPA	4,
SOUTH DAKOTA	Rapid City	KOTA	6, 7
	Sioux Falls	KELO	3
		KSDO	5, 6

STATE	CITY	TV STATION	PROGRAMMING
TENNESSEE	Chattanooga	WRIP	7
		WTVC	5
	Kingsport	WKPT	6
	Knoxville	WATE	6
		WBIR	5, 7
		WTVK	5
	Memphis	WHBQ	5
		WMC	5
	Nashville	WLAC	5
		WSIX	5
		WSM	4, 5
TEXAS	Abilene	KRBC	6
	Amarillo	KFDA	5, 6
		KGNC	7
		KVII	6
	Austin	KHFI	5
		KTBC	4, 6
	Beaumont	KFDM	4, 6
	Corpus Christi	KZTV	5
	Dallas	KDFW	5
		KDTV	7
		WFAA	5
	El Paso	KELP	4
		KTSM	5, 6
	Fort Worth	KTVT	5
	Houston	KHOU	3, 6
		KHTV	5
		KTRK	4, 5
		KVRL	5
	Lubbock	KCBD	6
		KLBK	6, 7
	Midland	KMID	7
	Odessa	KOSA	5
	San Angelo	KCTV	7
	San Antonio	KENS	5
		KWEX	6
	Temple	KCEN	7
	Wichita Falls	KFDX	5, 6
UTAH	Salt Lake City	KSL	6
VERMONT	Burlington	WCAV	6
		WVNY	5

STATE	CITY	TV STATION	PROGRAMMING
VIRGINIA	Bristol	WCYB	7
	Hampton-Norfolk	WVEC	4, 7
	Harrisonburg	WSVA	6, 7
	Norfolk	WTAR	7
	Portsmouth	WYAH	7
	Richmond	WTVR	6
		WWBT	7
		WXEX	5
	Roanoke	WSLS	7
WASHINGTON	Bellingham	KVOS	6
	Seattle	KING	4
		KIRO	7
		KOMO	7
	Spokane	KREM	7
		KXLY	4, 7
	Tacoma	KTVW	7
	Yakima	KIMA	5, 6
WEST VIRGINIA	Charleston	WCHS	4, 5
	Clarksburg	WBOY	5
	Huntington	WSAZ	6
	Oak Hill	WOAY	7
	Wheeling	WTRF	5
WISCONSIN	Eau Claire	WEAU	6, 7
	Green Bay	WLUK	7
	La Crosse	WKBT	5
	Madison	WISC	7
		WKOW	4
		WMTV	6
	Milwaukee	WISN	5
		WITI	5
		WTMJ	5
	Rhinelander	WAEO	7
	Wausau	WAOW	7
		WSAU	5
WYOMING	Thermapolis	KWRB	6

PBS STATIONS BROADCASTING CAPTIONED ABC EVENING NEWS*

STATE	CITY	TV STATION	CARRIAGE TIME
ALABAMA	Birmingham	WBIQ	10:30 CT
	Mt. Cheaha	WCIQ	
	Demopolis	WIIQ	
	Dozier	WDIQ	
	Florence	WFIQ	
	Huntsville	WHIQ	
	Louisville	WGIQ	
	Mobile	WEIQ	
	Montgomery	WAIQ	
ARIZONA	Phoenix	KAET	11:30 MT
CALIFORNIA	Eureka	KEET	11:30 PT
	Redding	KIXE	
	Sacramento	KVIE	
	San Bernardino	KVCR	
	San Francisco	KQED	
	San Jose	KTEH	
CONNECTICUT	Bridgeport	WEDW	11:00 ET
	Hartford	WEDH	
	New Haven	WEDY	
	Norwich	WEDN	
	Waterbury		
DISTRICT OF COLUMBIA		WETA	11:30 ET
FLORIDA	Jacksonville	WJCT	11:30 ET
	Miami	WPBT	
	Pensacola	WSRE	10:30 CT
	Tampa	WEDU	11:30 ET
GEORGIA	Atlanta	WETV	11:30 ET
ILLINOIS	Chicago	WTTW	11:30 CT
	Peoria	WTVP	10:30 CT
	Urbana	WILL	

*As of January 31, 1977

ET=EASTERN TIME MT=MOUNTAIN TIME
CT=CENTRAL TIME PT=PACIFIC TIME

STATE	CITY	TV STATION	CARRIAGE TIME
INDIANA	Bloomington	WTIU	11:30 ET
	Evansville	WNIN	10:30 CT
	Indianapolis	WFYI	11:30 ET
KANSAS	Topeka	KTWU	10:30 CT
	Wichita	KPTS	
KENTUCKY	Louisville	WKPC	11:30 ET
MAINE	Augusta	WCBB	11:30 ET
	Biddeford	WMEG	11:00 ET
	Calais	WMED	
	Orono	WMEB	
	Presque Isle	WMEM	
MASSACHUSETTS	Boston	WGBX	11:00 ET
	Springfield	WBBY	11:30 ET
MICHIGAN	Alpena	WCML	11:30 ET
	Detroit	WTVS	
	East Lansing	WKAR	
	Marquette	WNMU	
	Mt. Pleasant	WCMU	
	University Center	WUCM	
MINNESOTA	Minneapolis	KTCI	10:30 CT
	Duluth	WDSE	
MISSOURI	St. Louis	KETC	11:00 CT
NEBRASKA	Alliance	KTNE	10:30 CT
	Bassett	KMNE	
	Hastings	KHNE	
	Lexington	KLNE	
	Lincoln	KUON	
	Merriman	KRNE	
	Norfolk	KXNE	
	North Platte	KPNE	
	Omaha	KYNE	
NEVADA	Las Vegas	KLVX	11:30 PT
NEW JERSEY	Camden	WNJS	11:00 ET
	Trenton	WNJT	

STATE	CITY	TV STATION	CARRIAGE TIME
NEW MEXICO	Albuquerque	KNME	11:30 MT
	Las Cruces	KRWG	
	Portales	KENW	
NEW YORK	Buffalo	WNED	11:00 ET
	New York City	WNET	12:00 ET
	Rochester	WXXI	11:00 ET
	Syracuse	WCNY	
NORTH DAKOTA	Fargo	KFME	10:30 CT
	Grand Forks	KGFE	
OHIO	Akron	WEAO	11:30 ET
	Alliance	WNEO	
	Bowling Green	WBGU	
	Cincinnati	WCET	
	Cleveland	WVIZ	
	Dayton	WOET	
	Oxford	WMUB	
OKLAHOMA	Oklahoma City	KETA	10:30 CT
	Tulsa	KOED	
PENNSYLVANIA	Bethlehem	WLVT	11:30 ET
	Erie	WQLN	
	Hershey	WITF	11:00 ET
	Philadelphia	WHYY	
	Pittsburgh	WQED	11:30 ET
	University Park	WPSX	11:00 ET
	Scranton	WVIA	
RHODE ISLAND	Providence	WSBE	11:30 ET
SOUTH CAROLINA	Allendale	WEBA	11:30 ET
	Beaufort	WJWJ	
	Charleston	WITV	
	Columbia	WRLK	
	Florence	WJPM	
	Greenville	WNTV	
	Sumter	WRJA	
SOUTH DAKOTA	Aberdeen	KDSD	10:30 CT
	Brookings	KESD	
	Eagle Butte	KPSD	
	Lowry	KQSD	
	Pierre	KTSD	
	Rapid City	KBHE	
	Vermillion	KUSD	

STATE	CITY	TV STATION	CARRIAGE TIME
TENNESSEE	Knoxville	WSJK	11:30 ET
	Nashville	WDCN	10:30 CT
TEXAS	Austin	KLRN	10:30 CT
UTAH	Salt Lake City	KUED	11:30 MT
VIRGINIA	Norfolk	WHRO	11:30 ET
	Richmond	WCVE	
WASHINGTON	Spokane	KSPS	11:30 PT
	Tacoma	KPCQ	
WEST VIRGINIA	Huntington	WMUL	11:30 ET
	Morgantown	WWVU	
WISCONSIN	Madison	WHA	10:30 CT
	Milwaukee	WMVS	
	Colfax	WHWC	
	Green Bay	WPNE	
	La Crosse	WHLA	

The captioned version of the ABC news is available to other PBS stations through the Eastern Educational Network and the Public Television Library. The program is broadcast on PBS channels in cooperation with local ABC affiliate stations, who must give permission for such broadcasts.

TELEVISION PROGRAMMING CODE

Television Programming Guide

1) captioned emergency bulletins *
2) interprted emergency bulletins *
3) captioned weekday news
4) interpreted weekday news
5) public affairs programs interpreted or captioned for deaf viewers
6) public affairs programs about deafness for general audiences
7) nationally syndicated or network programs scheduled for regular presentation and featuring deaf actors or interpreters for deaf viewers.

* dead categories

SUPREME COURT OF THE UNITED STATES

No. 81-298

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, PETITIONER

v.

SUE GOTTFRIED, ET AL.

ORDER ALLOWING CERTIORARI

Filed January 11, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, limited to Question 2 presented by the petition.

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SUPREME COURT OF THE UNITED STATES

No. 81-799

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SUE GOTTFRIED, ET AL.

ORDER ALLOWING CERTIORARI

Filed January 11, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

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Opposition

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Nos. 81-298, 81-799

IN THE

Supreme Court of the United States

October Term, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,
Petitioner,

vs.

SUE GOTTFRIED, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

vs.

SUE GOTTFRIED, *et al.*,
Respondents.

Consolidated Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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November 25, 1981

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Whether the court of appeals was correct in holding that the Federal Communications Commission, in a broadcast licensing proceeding concerning a recipient of Federal financial assistance, may not ignore prima facie allegations of discrimination against the deaf and hearing impaired in the station's viewing area, in view of the national antidiscrimination policy expressed by Congress in the Rehabilitation Act, and the need for the FCC to make an individual and independent determination under the Communications Act public interest standard for each and every renewal application that comes before it.

2. Whether it is premature for the Supreme Court to consider the question of the interrelationship between the Rehabilitation Act and the Communications Act in the posture of a court of appeals remand of a license renewal application for further proceedings, which may or may not ultimately entail negative sanctions against the licensee.

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Nos. 81-298, 81-799

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FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

vs.

SUE GOTTFRIED, *et al.*,

Respondents.

Consolidated Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respondents Sue Gottfried and the Greater Los Angeles Council on Deafness, Inc., respectfully urge this Court to deny the petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit filed in these proceedings by Community Television of Southern California (KCET-TV) and the Federal Communications Commission (FCC). Rather, respondents herein request that the Court grant only the petition for certiorari which they

filed on October 2, 1981 under the caption Sue Gottfried et al. v. Federal Communications Commission, No. 81-651. In the event the Court were to grant the petitions in No. 81-298 and No. 81-799, respondents respectfully request that their petition in No. 81-651 also be granted.

Opinions Below.

The opinion of the court of appeals is reported at 655 F.2d 297 (FCC App. A, 1a-42a). The decisions of the Federal Communications Commission are reported at 69 F.C.C. 2d 451 (1978), *recon. denied*, 72 F.C.C. 2d 273 (1979) (FCC Apps. D and E, 47a-78a).

Jurisdiction.

The judgment of the court of appeals was entered on April 17, 1981. Timely petitions for rehearing were denied on July 8, 1981 (FCC Apps. B and C, 43a-46a). Community Television of Southern California (KCET) timely filed its petition for a writ of certiorari on August 14, 1981. After the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari, the FCC timely filed its petition on October 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutes and Regulations Involved.

The relevant statutory and regulatory provisions are set forth in FCC App. F, 79a-90a.

Statement of the Case.

It is not necessary to restate the facts of this case, even though petitioners have slighted some significant facts and, particularly in the case of KCET, exaggerated the court's holding below. In the interest of brevity, respondents will make just two points in the counterstatement.

First, the history leading up to the decision below demonstrates a sad trail of broken promises for television service to the deaf. Although the FCC had announced to broadcasters, since 1970, that the public interest contemplates programming service to the deaf and hearing impaired audiences, and Congress had set a national policy of nondiscrimination against the deaf and all disabled people in the Rehabilitation Act of 1973, the FCC steadfastly refused to consider the question of discrimination against the deaf in the license renewal process. In so doing, the agency has played a shell game with the hearing impaired audience. It shifts between rulemaking and individual adjudications and among administrative agencies, so that it always finds that those seeking relief are in the wrong forum.

The court of appeals below simply called an end to this abusive administrative sleight of hand. It reversed the FCC's arbitrary refusal to consider a matter clearly within the agency's regulatory ambit. The Commission must make a public interest determination of every license application before it, the court observed, and it could not capriciously decide that the issue of discrimination against the deaf should avoid scrutiny in this context, at least where the renewal applicant is the recipient of Federal financial assistance and thus directly within the Congressional nondiscrimination dictates expressed in the Rehabilitation Act.

Secondly the court's remand merely mandated Commission consideration of the issue. It did not venture into the next question of what constitutes service to the deaf sufficient to meet minimal requirements under the public interest standard. That, the court held, is most appropriately determined by the Commission, as part of its broad discretionary powers on remand.

The petitioners are thus prematurely asking this Court to intervene in the middle stages of an administrative pro-

ceeding. It is quite possible that on remand the Commission will perform its statutory duties rationally and without severe or, for that matter, any negative sanction against KCET-TV.[1] It is probably for this reason that respondents are unable to locate a single instance that this Court has previously granted a writ of certiorari at this intermediate procedural stage of the broadcast licensing process. In the interest of judicial economy, and because the court's decision below is clearly correct, Supreme Court review is not appropriate here either.

---

[1]The suggestion by the petitioners that a remand for future proceedings is itself a negative sanction is unpersuasive. First of all, it is very possible that proceedings before the Commission would be less costly than the ultimate costs of full Supreme Court review. Furthermore, the possibility of license renewal proceedings for prima facie charges of violation of licensee responsibilities is one cost of the privilege of operating a scarce broadcast license — a cost that is preventable by meritorious operations of the station in the public interest. *Cf. Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

ARGUMENT.

I.

SUPREME COURT REVIEW IS NOT WARRANTED SINCE THE DECISION TO REMAND KCET'S SUMMARY LICENSE RENEWAL GRANT IS CLEARLY CORRECT, AND NOT IN CONFLICT WITH OTHER FEDERAL COURT DECISIONS.

The petitions for a writ of certiorari contain two basic arguments for this Court's review. First and foremost, petitioners contend that the court of appeals usurped the FCC's administrative discretion to determine when and how the public interest standard of the Communications Act should include certain Congressionally expressed National policies such as the antidiscrimination dictates of the Rehabilitation Act of 1973. As the respondents demonstrate below, however, the court of appeals simply reversed the agency's clear abuse of discretion. The Commission arbitrarily refused to consider a National policy relevant to the agency's governing purposes, and it unreasonably disregarded previous Commission expressions of protection for the hearing impaired audience under the public interest standard.

Secondly, KCET alone argues that the court's decision below conflicts with this Court's interpretations of the Rehabilitation Act, 29 U.S.C. §794. This argument is premised on a misreading of the decision below. Because the court of appeals decision did not encompass the appropriate standard of compliance with the Rehabilitation Act by public television stations, there is no conflict at this point with *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), or *Pennhurst State School v. Halderman*, 101 S.Ct. 1531 (1981). Rather, the court below quite properly and carefully took pains to defer to the Commission's "special expertise concerning what can reasonably be expected of

a public broadcaster within the context of current technology and current needs." (FCC App. A, 29a. See also *id.* at 24a, n.49, and 25a).

A. The Court Below Was Clearly Correct in Reversing the FCC's Arbitrary and Capricious Refusal to Consider Allegations of Discrimination Against the Hearing Impaired in the Context of a Broadcast License Renewal Proceeding Involving a Recipient of Federal Financial Assistance.

Under Section 309 of the Communications Act, 47 U.S.C. 309, the FCC must consider each broadcast renewal application according to the public interest, convenience and necessity. If substantial and material questions of fact are raised regarding this determination, or if for any reason a specific public interest finding cannot be made, Congress requires the Commission to designate the application for an evidentiary hearing. *Id.; Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

Upon failure by a licensee to meet its burden to show that renewal would serve the public interest, a hearing may be designated regardless of whether or not the licensee is in violation of a specific FCC rule. Thus in *Alabama Educational Television Commission*, 50 F.C.C. 2d 461 (1975), the licensee's discriminatory practices in its programming did not violate a particular rule but was nevertheless found violative of the public interest standard.[2]

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[2]Hearings have been imposed for other failures to make public interest determinations on issues outside of specific FCC rules. *E.g., West Coast Media*, 79 F.C.C. 2d 610, 625 (1980), *recon. denied*, 86 F.C.C. 2d 331 (1981), *appeal pending*, D.C. Cir. No. 81-1548 (promise versus performance); *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962) ("ascertainment" of community needs); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) (potential economic injury to existing stations a ground for hearing on a new application). *Cf. FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) (misrepresentation).

As this Court has often observed, an administrative agency must give at least some weight to Federal laws and policies addressed to similar purposes as its own governing statute. *E.g.*, *NAACP v. FPC*, 425 U.S. 662 (1975); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944); and cases cited in opinion below at FCC App. A, 20a-21a. In the past the FCC has exerted its authority to include the policies of other legislative acts within its own public interest standard even though the enforcement of those policies had been specifically delegated to other federal agencies. The Commission has considered antitrust matters, for example, where enforcement comes within the province of the Attorney General and the courts. See, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 222 (1943); *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949).

Although antitrust policy directly relates to the Communications Act, *e.g.*, 47 U.S.C. §313, the policy of Section 504 of the Rehabilitation Act, 29 U.S.C. §794, namely nondiscrimination against the handicapped, bears just as close, if not an even closer relationship to the FCC's regulatory goals. Congress created the Commission to regulate broadcasting so as to provide the maximum benefits of that medium to all significant groups of people in the United States. 47 U.S.C. §151; *NAACP v. FPC*, *supra*, 425 U.S. at 670, n.7 (programming is to reflect the tastes of minority groups). Thus, even though the Equal Employment Opportunity Commission was given primary responsibility for enforcement of the nondiscrimination provisions of the 1964 Civil Rights Act, the FCC adopted its own Equal Opportunity rules in 1968. It recognized then that its obligations under the public interest standard of the Communications Act required as much. *Nondiscrimination in the Employment Practices of Broadcast Licensees*, 13 F.C.C. 2d 766, 767-

769, 772 (1968). *See also NAACP v. FPC, supra.* It follows that, at the least, the Commission should consider the similar policies expressed in the Rehabilitation Act when reviewing applications by recipients of Federal financial assistance.

It is perplexing and ironic that the Commission would now express fears to this Court that the court's decision below might also require consideration under the public interest standard of allegations of sex discrimination and age discrimination, citing to 20 U.S.C. §1681(a) and 42 U.S.C. §6102. (F.C.C. Petition, p. 13.) For not only would discrimination by any licensee against these groups appear to raise character questions, *National Organization for Women, NYC Chapter v. FCC*, 555 F.2d 1002, 1017 (D.C. Cir. 1977), but also the Commission has specifically taken the affirmative step of including women, the elderly and youth, along with ethnic minorities, as specific categories of leaders requiring ascertainment by all broadcasters at renewal time. *Id.; Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C. 2d 418, 447 (1975), *recon. granted in part*, 61 F.C.C. 2d 1 (1976). Rather than a parade of horribles, the Commission's argument aptly reinforces the point that service to minorities is a goal of broadcast regulation, and that the Commission has unreasonably discriminated against the deaf and disabled by refusing to recognize the relevance of the Congressional policy expressed in the Rehabilitation Act to its regulatory duties.

The court below, then, simply reversed the FCC for its abuse of discretion and erroneous view of the law. In doing so, the court imposed a duty to scrutinize only the renewals of recipients of Federal financial assistance at this time, reasoning that the Congressional policy was intended to apply directly to that class. While the court could have gone further in its line of reasoning, and applied the policy of the Rehabilitation Act to all licensees under the public in-

terest standard, it did not do so. Rather, taking its cue from recent decisions of this Court, the court of appeals deferred on that question to the good faith discretion of the Commission.[3]

Conclusion.

In view of the clearly correct nature of the court's analysis, the failure of the petitioners to demonstrate a conflict with other federal cases, and the premature procedural posture of the case, respondents respectfully urge that the petitions for a writ of certiorari be denied.

Respectfully submitted,

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November 25, 1981

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[3]In No. 81-651, Gottfried et al. submit that the court below erred by not holding that commercial licensees are recipients of Federal financial assistance and should be treated the same as public stations.

*Counsel of record.

**Counsel wish to acknowledge the assistance of Ms. Norma Garcia, Law Student, UCLA School of Law, in preparing this Opposition.

Petitioner's Reply Brief

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No. 81-298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,

Petitioner,

v.

SUE GOTTFRIED and GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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December 11, 1981

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As counsel advised the Court by letter of August 14, 1981, Petitioner is neither the parent nor the subsidiary of any corporation

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-298

COMMUNITY TELEVISION OF
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SUE GOTTFRIED and
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COUNCIL ON DEAFNESS, INC., *et al.*,

Respondents.

**On Petition For Writ Of Certiorari To
The United States Court Of Appeals For
The District Of Columbia Circuit**

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

Neither Respondent Gottfried nor the FCC has responded convincingly to Petitioner KCET's argument that the Court should review the first question here: whether Section 504 of the Rehabilitation Act of 1973 requires a noncommercial television station to take affirmative action to modify its broadcasts to make the aural portions accessible to the deaf. Nor has Gottfried addressed squarely and persuasively the arguments made by KCET here and by Petitioner in *FCC* v. *Gottfried*, petition for cert. pending, No. 81-799, that a writ should be granted to determine whether the Court of Appeals usurped the proper discretion of the FCC in requiring the FCC to make an independent assessment of KCET's compliance with the D.C. Circuit's

expansive interpretation of Section 504, even though enforcement of Section 504 is committed to other federal agencies.

1. Both Gottfried and the FCC contend that the first question presented by KCET is not ripe for review. This argument ignores the entire thrust of Judge Wright's opinion below. That opinion emphasizes throughout that Section 504 requires KCET, and presumably all other public television stations in the United States, to take immediate affirmative steps to make the aural part of their television broadcasts accessible to the deaf (*e.g.*, KCET Pet. A. 3a-4a, 14a-15a, 21a, 26a). To contend that the Court of Appeals did not direct some sort of affirmative action by stations to serve the deaf, albeit unspecific in detail, is to contend that the Court of Appeals issued a meaningless decision. The essence of the FCC decisions at issue was that, absent appropriate determinations by other responsible federal agencies, the FCC would not require noncommercial stations to provide the deaf with access to the aural part of their programs as a condition of renewal. If, as a result of the D.C. Circuit's decision, the FCC is not now obliged to require noncommercial stations to take affirmative action on behalf of the deaf, there is no reason for the remand. [1]

As a practical matter, the only way the aural portion of a television program can be made available to the deaf minority is through some form of special visual aid (such as captions or sign-language interpretations) that is not required by the hearing majority and which is not generally included in television programs. The very nature of their disability precludes the deaf

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[1] Although some comfort perhaps may be taken from the characterization of the Court of Appeals' opinion by the FCC's counsel here as "hortatory" (FCC Br. at 8), public broadcasters, who must conform their conduct to the Court's decision, cannot afford to be so sanguine or to rely on such a slender reed. Their licenses would be placed in peril by such an optimistic reading of the decision of the Court of Appeals should the FCC or the Court later conclude that the language was more than "hortatory." *See* pp. 4-5, *infra*.

from having access to the aural portion of television in any other way. Thus, any order requiring that the aural portion of programs be made accessible to the deaf, whether the order be very detailed or less specific as is the case here, will require stations to take substantial affirmative action to modify their television programs.

Substantial modifications of activity to permit access by the deaf is precisely the type of remedy that this Court has held that Section 504 does not require. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). Hence, while a remand to the FCC might permit that agency to fill in the details of compliance with the Court of Appeals' mandate (*e.g.*, perhaps determine the type and amount of visual assistance required), it does not appear that the remand provides latitude for the FCC to conclude that public stations do not have to take any affirmative steps to provide access to the deaf. Thus, the fact that there are to be further proceedings on remand does not eliminate the legal issue created by the decision of the Court of Appeals. The legal issue is whether Section 504 is limited to its "carefully worded *nondiscrimination* provision," *University of Texas* v. *Camenisch*, 101 S. Ct. 1830, 1835-36 (1981) (Burger, C.J., concurring), or whether, contrary to *Davis*, Section 504 requires television stations substantially to modify their programs to provide deaf persons with access to the aural portions of broadcasts from which their deafness alone otherwise precludes them. This legal issue is ripe now.

The FCC's vague claim that review is not necessary because service to the deaf can be accomplished by "maximizing the use of visual materials in news and sports programs" (FCC Br. at 8) begs the question.[2] Changing the form of affirmative action

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[2] The Court of Appeals appears not to have been persuaded that the FCC's 1970 limited requirement that licensees use "visual materials" to warn of emergencies is adequate to meet the needs of the deaf (KCET Pet. A.

(substituting "visual materials" for captioning or signing) does not change the *legal* issue.

Nor can it be said that review of the legal issue is premature because the FCC may determine that KCET's present practice of broadcasting "a significant number of programs with captioning or signing" complies with Section 504 (FCC Br. at 8; *see also* Gottfried Br. at 4). Such an order would merely transform KCET's level of voluntary service into an impermissible affirmative action requirement under Section 504.[3]

Certiorari should not be denied on the theory that the Court should not "intervene in the middle stages of an administrative proceeding" (Gottfried Br. at 3-4). Although KCET's renewal application has been remanded to the FCC "to determine, at least in the first instance, what Section 504 requires" (FCC Br. at 6), the Petition presents a clear-cut issue of law that "is fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). *See also, Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Rand* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947). In *United States* v. *General Motors*, *supra*, the "correctness of the decision of the court below [to remand for a new trial] depend[ed] upon the scope and meaning" of a constitutional amendment. 323 U.S. at 377. Here, the correctness of the decision below to remand for further agency proceedings depends upon the scope and meaning of Section 504. In any event, this Court has reviewed and reversed other cases from the D.C. Circuit without waiting for the completion of FCC remand

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34a-37a). There is no reason to believe that adoption upon remand of the similar steps suggested in the FCC's brief would satisfy the Court of Appeals either.

[3] KCET's voluntary service has been based on such factors as its varying financial ability, the varying availability of materials with visual aids, the perceived needs of the deaf minority, and the distractions imposed on the hearing majority in the audience by visual aids visible to all.

proceedings. *E.g.*, *FCC* v. *WNCN Listeners Guild*, 101 S. Ct. 1266 (1981).

The need for this Court's guidance on the meaning of Section 504 has become more urgent since the filing of KCET's Petition. Intervening developments reflect growing confusion among lower courts about the meaning of Section 504 (*see* KCET Pet. at 10). This is particularly apparent in *Greater Los Angeles Council of Deafness, Inc., et al.* v. *Community Television of Southern California, et al.* (C.D. Ca. Civ. No. CV-78-4715R), *appeal docketed*, Civ. App. No. 81-5952 (9th Cir., November 30, 1981), *stay granted* (December 2, 1981). (*See* KCET Pet. A. 39a). There the District Court relied heavily on the D.C. Circuit's decision in the instant case and ruled that Section 504 required that the deaf be given access to the aural part of television programs through captions or signing visible to all viewers.[4] That requirement, if upheld, would (a) prove costly, (b) change the very nature of television programming for the deaf and all other viewers, and (c) abridge broadcasters' rights under the First Amendment to exercise artistic and editorial discretion. The District Court ruling illustrates the mischief already flowing from the error of the Court of Appeals in this case. It demonstrates that, despite *Davis*, the lower courts, the

[4] The District Court granted KCET's motion to dismiss the complaint as to it pursuant to Fed. R. Civ. P. 41(b), concluding that plaintiffs "failed to prove that KCET has discriminated against the deaf or hearing impaired in violation of Section 504 of the Rehabilitation Act of 1973 or the Fifth and Fourteenth Amendments to the Constitution of the United States." Order entered November 4, 1981. Thereafter, following a bench trial involving the remaining federal defendants, the District Court ruled that, until the various federal defendants prescribe by regulation or provide by contract for "full compliance with section 504," they are enjoined from making any grants or disbursing any monies for the preparation or broadcast of television programs. Moreover, the system of "closed captions" (visible only by use of special decoders) which has been developed in recent years at a cost of more than $10 million in government and private funds, was held not to be an acceptable means of serving the deaf under Section 504.

FCC and numerous other federal agencies, public broadcasters and others sorely need this Court's guidance as to the proper scope and meaning of Section 504.

2. Although phrasing the question somewhat differently, KCET in this case and the FCC in No. 81-799 agree that the Court should review whether the Court of Appeals erred by holding that its expansive interpretation of the "national policy" reflected in Section 504 *must* be incorporated by the FCC in its "public interest" standard *and* that the FCC *must* measure KCET's compliance with this newly articulated obligation in acting on KCET's 1977 license renewal application.

Gottfried's contention that the FCC "must give at least some weight to Federal laws and policies addressed to similar purposes as its own governing statute" (Gottfried Br. at 7) is not supported by law. From the seminal case of *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), through last term's *FCC* v. *WNCN Listeners Guild, supra,* it has been held that the FCC, not the Court of Appeals, is to choose the components of the public interest standard and to decide how they are to be achieved. Technology to assist the deaf to obtain access to the aural part of television programs is at an experimental stage and evolving. Moreover, enforcement of Section 504 is committed to agencies other than the FCC. Thus, there was no compelling basis for the D.C. Circuit either to second guess the FCC's decision not at this time to incorporate the requirements of Section 504 into the public interest standard or to dictate to the FCC how it should "give weight" to the policy reflected in Section 504.

Review should not be denied because the FCC has considered some federal policies other than Section 504 in its licensing process (Gottfried Br. at 7-8). That the FCC considers antitrust and equal employment opportunity in one way does not mean that it has forfeited its discretion to consider other and different federal policies in other and different ways, particular-

ly where, as here, it provided a rational explanation for the exercise of its discretion.

Nor should review be denied on the theory that the FCC abused its discretion by ignoring the policy reflected in Section 504 (Gottfried Br. at 5, 8). The FCC decisions in this case recite in detail the agency's efforts to make television accessible to the deaf (KCET Pet. A. 45a-47a, 66a-67a) and the substantial and continuing progress toward that goal (*id.* at 66a-67a). Thus, the issue is not, as Respondent Gottfried would have it, whether the FCC may simply disregard public policy. Rather, the issue is whether the Court of Appeals may dictate what public policy the agency must take into account and how it must do it. The fundamental and recurring tension between the Court of Appeals and the FCC on this point, *see, e.g., FCC* v. *WNCN Listeners Guild, supra,* warrants this Court's further review of the issue, if not, indeed, the summary reversal of the Court of Appeals.

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Brief for the United States

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No. 81-298

In the Supreme Court of the United States

OCTOBER TERM, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,
PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL
ON DEAFNESS, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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QUESTIONS PRESENTED

1. Whether the decision of the court of appeals construes Section 504 of the Rehabilitation Act of 1973 to require public television stations to take affirmative action for the purpose of making their broadcasts accessible to the hearing impaired.

2. Whether the court of appeals erred by directing the Federal Communications Commission to incorporate Section 504 into the public interest standard contained in the Communications Act of 1934, and to enforce Section 504 in a public television station's license renewal proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-298

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 655 F.2d 297. The decisions of the Federal Communications Commission (Pet App. 41a-54a, 55a-67a) are reported at 69 F.C.C.2d 451 and 72 F.C.C.2d 273.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981 (Pet. App. 1a). Timely petitions for rehearing were denied on July 8, 1981 (Pet. App.

69a-72a). A petition for a writ of certiorari was filed on August 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT [1]

This litigation began when respondents petitioned the Federal Communications Commission to deny the license renewal application filed by petitioner (KCET), a non-commercial educational television station operating in Los Angeles, California. Respondents also petitioned to deny license renewal applications of seven commercial television stations in the Los Angeles area, including affiliates of all three major networks. The petitions charged, among other things, that the stations had violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, during the 1974-1977 license term under review by failing to offer programming understandable to the aurally handicapped.

Section 504 provides in relevant part that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *." Enforcement of these provisions of Section 504 has been committed to the federal agencies providing financial assistance,[2] rather than the FCC. In determining whether to renew a broadcast license, the

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[1] A more detailed statement appears in the government's petition for a writ of certiorari (*FCC* v. *Gottfried*, petition for cert. pending, No. 81-799) filed in this same case.

[2] 45 C.F.R. 85.1-85.7, amended and redesignated as 28 C.F.R. 41.1-41.7, 46 Fed. Reg. 40686-40687 (1981).

FCC is guided instead by Section 307(d) of the Communications Act of 1934, 47 U.S.C. 307(d), which provides that renewal may be granted "if the Commission finds that public interest, convenience, and necessity would be served thereby." The Communications Act contains no provision defining the duties of broadcasters toward handicapped persons or requiring the Commission to prescribe those duties.

The Commission denied the petitions (Pet. App. 53a). It held that the seven commercial stations were not subject to Section 504 because they did not receive federal financial assistance. By contrast, the Commission observed that the non-commercial station, KCET, "might fall within the purview" of the statute because it received federal funds (*id.* at 52a). Accordingly, the Commission stated that it would take into consideration any violations of Section 504 found by "the proper governmental agency to consider such matters," but it declined to make an independent assessment of KCET's compliance with Section 504 (*ibid.*).

While rejecting respondents' arguments concerning Section 504, the Commission noted (Pet. App. 44a-46a) that it had long sought technically and financially feasible methods of making television accessible to the handicapped as part of its responsibility under its own governing statutes. However, the Commission added that at present there were "too many unanswered questions," both "technical and financial," to permit the imposition of comprehensive requirements in this area (*id.* at 46a). The Commission subsequently denied respondents' petition for reconsideration (*id.* at 55a-67a).

A divided panel of the United States Court of Appeals for the District of Columbia Circuit vacated

the Commission's denial of the petitions concerning KCET (Pet. App. 1a-40a). In an opinion by Judge Wright, the majority held that KCET was bound by Section 504 because it received substantial federal grants (*id.* at 15a-18a). Noting that the "FCC is directed to renew broadcast licenses only if it finds that renewal would serve the 'public interest, convenience, and necessity' " (*id.* at 19a), the majority held that "the FCC's 'public interest' mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under Section 504 * * *" (*ibid.*).

The majority summarily rejected (Pet. App. 25a-26a) the Commission's contention that it could not enforce Section 504 until the funding agencies articulated standards for broadcasters under that provision. The majority similarly rejected the Commission's argument that it would be unfair to judge KCET's programming during the past license term by reference to Section 504's as yet undefined requirements in the field of broadcasting (*id.* at 26a-28a).

The court held that the Commission was required to "define the station's responsibilities under the Rehabilitation Act and to enforce the Act's policies in license renewal proceedings" (Pet. App. 18a), but the court itself refrained from prescribing standards for broadcasters. It stated that "[t]he ultimate decision is obviously not for us, but for the Commission, with its special expertise concerning what can reasonably be expected of a public broadcaster within the context of current technology and current needs" (*id.* at 27a-28a; footnote omitted). The court observed that the FCC need not "regard itself as bound strictly

by the specific dictates of the Rehabilitation Act" but must instead "effectuate the underlying national policy" expressed in Section 504 (*id.* at 25a). The court therefore remanded KCET's case and directed the Commission "to inquire at least into the station's good faith as manifest in its efforts to provide service in accord with the legislative policy goals of Section 504" (*id.* at 26a).

The court reached a different result with respect to the seven commercial broadcasting stations. Rejecting the argument that broadcast licenses constitute "Federal financial assistance" within the meaning of Section 504, the court unanimously held (Pet. App. 28a-33a, 38a) that the commercial stations lacked "specific obligations" under that provision.

Judge McGowan dissented from the court's decision concerning KCET, stating that public television stations should not be required to undergo costly renewal hearings until Section 504's requirements in the field of television broadcasting are articulated by the funding agencies charged with enforcement of that provision (Pet. App. 38a-40a).

ARGUMENT

Petitioner urges this Court to issue a writ of certiorari in order to review two questions. The first question (Pet. i, 7-11)—whether Section 504 requires public broadcasters to take affirmative action for the purpose of making their broadcasts accessible to the hearing impaired—is not presented by this case. The court of appeals required the Federal Communications Commission to enforce the "underlying national policy" expressed in Section 504 when ruling upon license renewal applications, but the court did not

specify the standards to be applied. Instead, it remanded this case to the Commission to perform that difficult task. Consequently, review by this Court of petitioner's first question is not warranted at this time.

However, petitioner's second question (Pet. i-ii, 11-17)—whether the court of appeals "erred by directing the FCC to incorporate Section 504 into the public interest standard" and to enforce Section 504 in petitioner's license renewal proceeding—is essentially the same as the question that we urged this Court to consider in our petition for a writ of certiorari (*FCC* v. *Gottfried*, petition for cert. pending, No. 81-799) in this same case. We therefore urge that the petition of Community Television of Southern California be granted with respect to its second question only.

1. Petitioner requests (Pet. 7-11) this Court to determine whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, requires that public television stations undertake "affirmative action" for the purpose of making their broadcasts accessible to the hearing impaired. Petitioner argues (Pet. 7-11) that the decision below imposes such a requirement and, further (Pet. 8 n.5, 11), that it mandates the "captioning or signing of programs."

We cannot agree with petitioner's expansive interpretation of the decision of the court of appeals. The court held that the Federal Communications Commission must assess a public television station's compliance with Section 504 in determining whether to grant an application for license renewal, but the court left it to the Commission to determine, at least in the first instance, what Section 504 requires. The

court stated: "The ultimate decision is obviously not for us, but for the Commission, with its special expertise concerning what can reasonably be expected of a public broadcaster within the context of current technology and current needs" (Pet. App. 27a-28a; footnote omitted). The court added: "There are many ways in which the policy of Section 504 of the Rehabilitation Act might be implemented. We hold only that it cannot be ignored" (*id.* at 28a). Furthermore, petitioner's suggestion that the court required the captioning or signing of all programs is inconsistent with the court's recognition that the requirements of Section 504 may vary from station to station depending upon each station's "capacity and its viewers' need" (*id.* at 27a).

Petitioner does not point to any portion of the opinion below in which affirmative action by public broadcasters is required. Nor does petitioner cite any portion of the opinion mandating captioning or signing. Indeed, petitioner acknowledges (Pet. 8 n.5):

> The Court of Appeals did not expressly state that KCET must caption or sign programming for the deaf, but its message seems unmistakable. The Court did say: "[i]t is time . . . that the benefits of television be made available to the hard of hearing now" (A. 4a); Section 504 requires stations to "attempt to serve the interests of the nation's hearing impaired minority" (A. 20a); and stations have a "duty to make reasonable efforts to serve the handicapped" (A. 26a). Since service to the deaf is not possible without captioning or signing, the Court in effect imposed a requirement to caption or sign.

We disagree with petitioner that service to the deaf necessarily entails the captioning or signing of some or all programs. For example, the deaf can be served by maximizing the use of visual materials on news and sports programs, as the FCC has required since 1970 (Pet. App. 45a). Furthermore, KCET, like many public television stations, already broadcasts a significant number of programs with captioning or signing (Pet. 3). Thus, a requirement of programming to serve the hearing impaired would not necessarily require alteration of KCET's present practices.

To be sure, while the opinion below does not impose affirmative action requirements, some of its hortatory language may have connotations to that effect. But until specific affirmative action requirements for public broadcasters are specified, petitioner's first question will not be ripe for review. This is especially true because "the line between a lawful refusal to extend affirmative action and illegal discrimination [is not] always * * * clear." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 412 (1979). Thus, until specific standards can be examined, it will not be possible to determine with certainty whether a court or agency has overstepped the line.

2. Petitioner's second question (Pet. i-ii, 11-17) —whether the court of appeals erred by directing the FCC to incorporate Section 504 into the public interest standard and to enforce Section 504 in petitioner's license renewal proceeding—is essentially the same as the question that we urged this Court to consider in our petition (*FCC* v. *Gottfried*, petition for cert. pending, No. 81-799) in this case. For the rea-

sons set forth there, we believe that petitioner's second question warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to Question Two presented in the petition.

Respectfully submitted.

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DECEMBER 1981

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE AND NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE, AND NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), and the National Association of Public Television Stations ("NAPTS") respectfully move for leave to file the attached brief *amici curiae* in this case. Although counsel for petitioners have consented to the filing of this brief, counsel for respondents Gottfried and the Greater Los Angeles Council on Deafness, Inc. ("GLAD") has withheld consent, necessitating this motion for the Court's indulgence.

The Corporation for Public Broadcasting is a private, non-profit District of Columbia corporation organized

pursuant to the Public Broadcasting Act of 1967 for the purpose of facilitating the development of non-commercial, educational broadcasting in the United States. *See* 47 U.S.C. §§ 396(a), (b), (g)(1) (1976). Under the authority granted it by the Act, CPB is engaged in funding the production and distribution of non-commercial programs and conducts other activities designed to further the growth of non-commercial, educational broadcasting.

The Public Broadcasting Service is a private, non-profit membership corporation organized under the laws of the District of Columbia. Its members include virtually all of the licensees of non-commercial, educational (public) television stations in the United States. PBS manages the primary national television interconnection system and distributes programs to public television stations throughout the country. PBS also provides its members with other program and program-related services. In addition, PBS, with financing and encouragement from CPB and various governmental agencies, pioneered in development and implementation of closed captioning technology whereby the hearing-impaired gain access visually to the audio portion of television programs. PBS presently provides such visual aids for a substantial portion of the programs it distributes and, together with the local public television stations which air these programs, accounts for the vast majority of visual aids currently broadcast for these disabled.

The National Association of Public Television Stations is also a private, non-profit membership corporation organized under the laws of the District of Columbia. Most of the nation's public television stations, including KCET, are members of NAPTS. NAPTS coordinates and conducts planning activities for its member stations outside the area of programming and represents their interests before Congress, federal agencies, CPB and the public.

CPB, PBS and NAPTS are intimately involved with the operation of public television and are committed to the growth of a creative and responsive non-commercial, educational television service in the coming period of public fiscal restraint. As described in the accompanying brief, the decision of the District of Columbia Circuit in *Gottfried, et al. v. FCC*, 655 F.2d 297 (D.C. Cir. 1981), has ramifications far beyond the individual concerns of the particular public television station whose renewal is in issue and immediately threatens the financial well-being and independence of all public television stations.

As *amici curiae* CPB, PBS and NAPTS would seek to apprise the Court of these ramifications and demonstrate the need for a writ of certiorari at this time. Because of their national perspectives, CPB, PBS and NAPTS are better able to bring to the Court the full systemwide implications of the Court of Appeal's decision than are the petitioners, Community Television of Southern California and the Federal Communications Commission.

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IN THE

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE AND NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), and the National Association of Public Television Stations ("NAPTS") respectfully support the petitions of Community Television of Southern California ("KCET") and the Federal Communications Commission ("FCC") for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit to review the decision of that court in *Gottfried, et al. v. Federal Communications Commission, et al.*, 655 F.2d 297 (D.C. Cir. 1981).

INTEREST OF *AMICI CURIAE*

As described more fully in the accompanying Motion for Leave to File Brief, the Corporation for Public Broadcasting, the Public Broadcasting Service, and the National Association of Public Television Stations are private nonprofit corporations organized to encourage and promote the development of non-commercial, educational broadcasting in the United States. As such, they are acutely aware of both (1) the difficult situation in which virtually every public television station has been placed by the decision below, and (2) the financial burden and editorial intrusion that would be occasioned by a requirement to provide visual aids with the programs broadcast by this medium. The opinion below, which shows marked conflict with clear teachings of this Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), threatens to cause a fundamental and costly alteration in the manner in which public television operates. The appellate opinion, exacerbated by recent developments in another forum, thus immediately threatens the independence and financial well-being of all public television stations.

SUMMARY OF ARGUMENT

The writ of certiorari should be granted because the opinion below conflicts with recent decisions of this Court concerning both the FCC's discretion to determine how to proceed in evaluating whether a license renewal applicant has served the public interest and the appropriate interpretation of Section 504 of the Rehabilitation Act of 1973. This is an apt time to resolve these conflicts because the appellate court's decision applies to the renewal applications which public broadcasters will be filing in the coming months and years and thus raises serious and immediate questions for every public television station in the country. Each station must now reexamine its behavior and attempt to predict what will constitute sufficient compliance with Section 504. This task is made even more difficult because a federal judge in California, relying extensively on the decision below, recently ruled that closed captioning, which was encouraged by the FCC and other federal agencies and which is the principal means by which public television has sought to offer access to the hearing-impaired, does not suffice. Thus public broadcasters must choose between jeopardizing their license renewals by continuing to provide significant closed captioning and instituting other types of visual aids that intrude on editorial discretion and distract their hearing audiences. Only this Court can remedy the misreading of *Davis* and other applicable precedents that caused this predicament. The Court should clarify at this time the standards which apply to public television pursuant to Section 504 and should enforce again those which mandate broad FCC discretion.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IN *GOTTFRIED, ET AL.* v. *FCC* CONFLICTS WITH DECISIONS OF THIS COURT, HAS WIDESPREAD SIGNIFICANCE TO PUBLIC TELEVISION, AND SHOULD BE CORRECTED NOW.

In *Gottfried, et al. v. FCC*, 655 F.2d 297 (D.C. Cir. 1981), the D.C. Circuit determined that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1979) (Supp. III), requires public television to provide the hearing-impaired with special access to its programming and ordered the FCC to review as part of its "public interest" inquiry during license renewal proceedings whether public television stations have satisfied the requirements of Section 504 by making their programs accessible to the hearing-impaired. That opinion conflicts with recent decisions of this Court as to the FCC's broad discretion in applying the public interest concept and as to the proper interpretation of Section 504.

In *FCC v. WNCN Listeners Guild*, 101 S.Ct. 1266 (1981), the Court reiterated the long-standing principle that the public-interest standard embodied in the Communications Act of 1934 is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." 101 S.Ct. at 1274, *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Court also noted the breadth of the FCC's discretion to determine how it will discharge its statutory responsibilities and accordingly emphasized that the judiciary should not substitute its own views on the best method of securing maximum broadcasting benefits for those of the Commission. *Id.* The court below has done just that, however. The FCC had held, consistent with its established policy concerning violations of statutes other than the Communications Act, that it would review claims that public broadcasters had failed to discharge obligations imposed by Section 504

after federal agencies charged with enforcing that statute had ruled. That approach represents a reasonable accommodation between the policy of acknowledging licensee duties that flow from a myriad of other federal statutes, such as Section 504, and the policy of avoiding premature, unnecessary and potentially inconsistent restrictions on licensee discretion when the responsible federal agencies had not yet acted. Nevertheless, the court swept that accommodation aside and boldly substituted its own view that "[i]t is time for the Commission to act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now." 655 F.2d at 301.[1]

In addition to its obvious conflict with *Listeners' Guild* and prior precedent, this pronouncement crystalizes a further conflict, a conflict between the opinion below and the Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The sentence quoted above makes clear the appellate court's conclusion that public television stations are obligated by Section 504 to provide affirmative assistance to the aurally handicapped. *Davis* held, however, that Section 504 forbids discrimination against the "otherwise qualified" handicapped, but does not impose intrusive burdens of affirmative action on those who receive federal financial assistance. 442 U.S. at 410. *Davis* further held that a regulatory agency, in the guise of enforcing Section 504, may not impose burdens

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[1] In so ruling, the court elevated Section 504 to a status unique among the numerous federal statutes whose violation may reflect on a licensee's qualifications. *Cf.* FCC-EEOC Memorandum of Understanding, 70 F.C.C.2d (1978), *rev. dismissed*, 46 RADIO REG. 2d (PIKE & FISHER) 1175 (D.C. Cir. 1979); Violation by Applicants of Laws of the United States, 42 F.C.C.2d 399 (1951); Mount Hood Radio & Tel. Broadcasting Corp., 59 F.C.C.2d 1198, 1201 (1976). There is no basis for believing Congress intended such a different and drastic method of enforcing Section 504. *See* 29 U.S.C. § 794a (1979) (Supp. III) (Section 504 to be enforced in the same manner as Title VI of the Civil Rights Act of 1964).

of affirmative action eschewed by Congress in adopting Section 504. *Id.* at 411-12.[2]

In analyzing the policy import of Section 504, the court below virtually ignored *Davis*. *Davis* merited, in the panel's view, but one brief nod—ironically, to the difficulty of drawing the line between illegal discrimination and the lawful refusal to extend affirmative action.[3] 655 F.2d at 310. The opinion as a whole, however, ignores that very difficulty and proceeds squarely to conclude that Section 504 requires public television stations to provide visual aids for the hearing-impaired. That the precise details for fulfilling this obligation were left to the FCC's discretion does not solve the problem because the import of the opinion is clear on the underlying legal issue: Section 504 requires public television to make burdensome affirmative efforts to provide access to the hearing-impaired.

This misreading of *Davis* and the court's violation of general principles concerning FCC discretion create a serious dilemma for public television stations because the court's ruling applies to FCC review of license renewal applications. Thus, without the benefits of rulemaking which, after notice and the opportunity for comment, might define their obligations under Section 504, every public broadcasting station will have to reexamine its programming practices in light of the D.C. Circuit's pronouncement that it is required to undertake affirmative efforts to provide access to the hearing-impaired. Adherence to previous policies, which reflected a reasonable interpretation of this Court's decision in *Davis*, would

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[2] *See also* Pennhurst State School and Hospital v. Halderman, 101 S. Ct. 1531, 1544-45 (1981), in which the Court reiterated its *Davis* analysis, and University of Texas v. Camenisch, 101 S. Ct. 1830, 1835-36 (1981) (Burger, C.J., concurring), in which the Chief Justice repeated the admonition that an administrative agency has no power to rewrite by means of regulations the carefully drafted statutory nondiscrimination scheme.

[3] There was no finding of discrimination on the part of KCET by the Court of Appeals or the FCC.

likely jeopardize these stations' own license renewals, over which the D.C. Circuit has exclusive appellate jurisdiction.[4] As a result, public television stations will have little choice except to conform to the preferences expressed in the opinion below and to incur the added expense of undertaking the affirmative steps necessary to make their programs accessible to the hearing-impaired.[5]

Station decisionmaking about how to conduct themselves now and in the immediate future is made even more difficult by recent developments in another forum. The United States District Court for the Central District of California recently held in *Greater Los Angeles Council on Deafness, Inc., et al. v. Community Television of Southern California, et al.* (C.D. Ca. Civ. No. CV-78-4715R), that closed captioning,[6] a highly effective method encouraged by the FCC and other federal agencies, is not a reasonable means of providing deaf persons with

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[4] See, 47 U.S.C. § 402(b) (1976).

[5] These increased expenses come at a time when public broadcasting is facing increasingly difficult financial stress and Congress has created a special Temporary Commission on Alternative Financing for Public Telecommunications in order to explore and develop means of preserving an innovative, responsive public broadcasting service. See P.L. 97-35, Aug. 13, 1981, 95 Stat. 731-36, §§ 1232 and 1233.

[6] Closed captioning, which was developed principally by PBS with funding and encouragement from CPB and various federal agencies, involves insertion of captions (subtitles) on a portion of the standard television signal not normally occupied by visual images. These captions can be received by use of a separate decoder or a specially adapted television set. The caption can be readily adapted for simultaneous transmission of a variety of foreign languages and reading levels, and remains invisible—and thus undistracting—to viewers whose sets do not have the decoding feature. Open captions, by contrast, can be seen by the entire audience.

access to television.[7] Presumably, full compliance with Section 504, in that court's view, would entail open captioning or signing of television programming, methods of access that are costly and, unlike closed captioning, detract significantly from the enjoyment of the hearing audience and intrude severely on the artistic and editorial discretion of producers and broadcasters.[8] This ruling was reached by a misreading of *Davis* along the lines of that in the opinion below, which was cited extensively by the District Court. As a result, public broad-

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[7] That case involves claims under Section 504 against Petitioner KCET, *amici* CPB and PBS, the Department of Health and Human Services, the Department of Education, the Attorney General and the FCC. The District Court dismissed the complaints against KCET, CPB and PBS under Fed. R. Civ. P. 41(b), concluding that the plaintiffs had failed to demonstrate that those defendants had violated Section 504.

With respect to the federal defendants, however, the court ordered an immediate termination of funds for the preparation or airing of television programs until those defendants had set forth by regulation or provided by contract for "full compliance with Section 504" by their funding recipients. In addition to declaring that closed captioning was not sufficient access for the hearing-impaired, the court ordered the Attorney General and the FCC to adopt regulations forthwith establishing compliance standards under Section 504 for public broadcasters.

[8] Because these methods require producers to superimpose captions or sign language interpretation on the underlying visual image, they compromise the integrity of a program's content. Moreover, because captions must be edited so as to permit transmission at readable speeds, they send messages which conflict somewhat with the aural content. Finally, such captioning would cause production delay on some programs and would affect the number, type and schedule of programs which a broadcaster could present. Broadcasting freedom would be diminished by any requirement to use open captions or signing, raising serious First Amendment issues. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); CBS v. Democratic National Comm., 412 U.S. 94 (1973). Even closed captions raise similar issues, but they do not intrude to the same degree on broadcasters' ability to reach the general public.

casters are now faced with the dilemma of jeopardizing their license renewals by continuing their present practices of providing closed captions for some programs or providing intrusive and distracting forms of access, against their editorial judgment and notwithstanding consequent disruption to the hearing audience.

Now is the appropriate time to correct these errors and provide public broadcasters with guidance, before inconsistent and burdensome interpretations of Section 504 proliferate.[9] The FCC already has exercised its discretion, properly formulating its role in the enforcement of Section 504 as to public broadcasters. It should not now be asked to act upon the basis of the flawed legal premises embraced by the appellate court. Neither the FCC nor the public broadcasting industry should be required to incur the expense and burden of further administrative proceedings on issues so clearly settled by this Court in *Davis*. The stations must act now to formulate new policies and only this Court can prevent the unnecessary confusion and hardship that will result if the opinion below remains undisturbed.

---

[9] The Department of Education, in response to an administrative complaint by Gottfried and GLAD, has issued a draft determination, based on its analysis of *Davis*, that KCET's practices comply with Section 504 and that neither open captioning nor signing may be required of public broadcasters because of First Amendment principles.

CONCLUSION

For the reasons set forth above, the Corporation for Public Broadcasting, the Public Broadcasting Service, and the National Association of Public Television Stations respectfully urge that the petitions of Community Television of Southern California and the Federal Communications Commission for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit be granted.

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November 25, 1981

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the Motion and Brief *Amici Curiae* of the Corporation for Public Broadcasting, the Public Broadcasting Service, and the National Association of Public Television Stations upon counsel for the parties by depositing them in a United States post office or mailbox this 25th day of November, 1981, with first-class postage prepaid, addressed to:

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I hereby further certify that all parties required to be served have been served.

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Petitioner's Brief

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IN THE

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FEDERAL COMMUNICATIONS COMMISSION,
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v.

SUE GOTTFRIED, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR PETITIONER COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA

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QUESTION PRESENTED

Whether the Court of Appeals erred by directing the Federal Communications Commission to incorporate into the public interest standard of the Communications Act that court's expansive interpretation of Section 504 of the Rehabilitation Act regarding program service for the deaf by non-commercial educational television stations, and to apply that new standard retroactively to Petitioner's 1977 license renewal application.

LIST OF PARTIES

The following parties appeared before the Court of Appeals: Mrs. Sue Gottfried; Greater Los Angeles Council on Deafness, Inc.; Federal Communications Commission; American Broadcasting Companies, Inc.; CBS, Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Company, Inc.; RKO General, Inc.; and Petitioner Community Television of Southern California. The Petitioner has no parent companies, subsidiaries, or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-298

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,

Petitioner,

v.

SUE GOTTFRIED, *et al.*,

Respondents.

No. 81-799

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

SUE GOTTFRIED, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR PETITIONER COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 655 F.2d 297, and is set out in the Appendix (hereinafter cited as "KCET App."), pp. 1a-40a, to the Petition for Writ of Certiorari filed

by Community Television of Southern California ("Community"). The decisions of the Federal Communications Commission ("Commission") are reported at 69 F.C.C.2d 451 and 72 F.C.C.2d 273, and are set out at KCET App. at 41a-67a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1981. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on July 8, 1981. Community filed its Petition for a Writ of Certiorari on August 14, 1981, and it was granted in part on January 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, and Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, as amended, appear at KCET App. at 73a-78a.

STATEMENT OF THE CASE

This case concerns intrusion by the Court of Appeals on the Commission's broad discretion under the Communications Act to interpret and enforce the public interest obligations of its licensees as to television programming for the deaf.

In 1977, Community filed its regular triennial application for license renewal for KCET, the non-commercial educational television station it has operated in Los Angeles since 1964. Despite the Commission's decision *not* to require any television station to provide special visually assisted programming for the deaf, other than certain emergency information, KCET had provided extensive special services during its 1974-77 license term.

Nonetheless, Respondents Sue Gottfried and others ("Gottfried") petitioned the Commission, pursuant to 47 U.S.C. § 309(d), to deny KCET's renewal, alleging the station had inadequately served the deaf. One ground for denial asserted by Gottfried was that KCET had not complied with Section 504 of the Rehabilitation Act, which prohibits recipients of Federal funds from discriminating against, excluding, or denying benefits to otherwise qualified handicapped persons. 29 U.S.C. § 794.

The Commission rejected Gottfried's petition. It relied on the absence of Commission requirements under the Communications Act to provide special visually assisted programming for the deaf other than emergency messages, the fact that it was not the enforcer of the Rehabilitation Act, and the fact that no enforcement agency had found KCET in violation of Section 504.

The Court of Appeals for the District of Columbia Circuit (per Wright, J.; McGowan, J., dissenting) reversed. After concluding that the "national policy of nondiscrimination against the handicapped minority" embodied in Section 504 must be incorporated in the public interest standard of the Communications Act, KCET App. at 19a, the Court of Appeals directed the Commission to decide in connection with KCET's 1977 renewal application whether the station had complied with that policy in its 1974-77 programming. KCET App. at 23a-28a. The court emphasized its "view [that] television . . . should be made available to persons with impaired hearing now." KCET App. at 15a.

We ask this Court to hold that the Court of Appeals exceeded its authority, first when it overturned the Commission's carefully developed policy under the Communications Act to encourage but not to require special programming for the deaf, and second when it ordered the Commission to determine in license renewal proceedings whether, during a long past license term,

KCET had discharged undefined duties to the deaf that are said to flow from the Rehabilitation Act. To place these issues in perspective, we shall sketch the technological and policy backdrop to special visually assisted television for the deaf before detailing the specific proceedings that have brought the matter to this Court.

I. SPECIAL VISUALLY ASSISTED TELEVISION FOR THE DEAF.

Television programs involve both aural and visual information. In order to make telecasts fully accessible to the one percent deaf segment of our society, it is necessary to convey visually information that is conveyed aurally to the non-deaf.[1] With the encouragement, cooperation, and assistance of the Commission, other government agencies, and some commercial broadcasters, for well over a decade public television entities[2] have grappled with the technological and other problems associated with extending television more fully to the deaf without impairing television service for others. KCET App. 45a-47a, 66a-67a. Technological developments together with economic burdens have complicated the matter. While progress may not have been as complete or as rapid as all may have wished, great strides have been made.

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[1] In 1971, the Department of Health, Education, and Welfare (HEW) estimated that there were 13.3 million persons in the United States with hearing problems. Of these, 6.2 million had difficulty with one ear only. Many of those with bilateral hearing problems retained some capacity to understand speech. Only 335,000 people could not hear any speech. *See* Captioning for the Deaf, 63 F.C.C.2d 378, 379 n.2 (1976). The Commission estimated that "as many as 2 million people may have sufficient loss of hearing so as to be unable to enjoy television programming without assistance from captioning." *Id.* at 389. The total population of the United States in 1970 was over 203 million people. 1 Bureau of Census, U.S. Department of Commerce, 1970 Census of Population 1-41 (1972).

[2] Non-commercial educational television hereinafter is called public television.

Achieving accessibility to television by the deaf is not easy. Sign language or facial closeups to permit lip reading, while beneficial for some deaf, are imperfect solutions. Many deaf do not effectively understand these methods. *See* KCET App. at 5la. Moreover, a cameo insert of a sign language interpreter on a portion of the screen may be too small to permit some of those deaf viewers who do understand sign language readily to comprehend the signs. And the presence of the insert not only blocks out a portion of the screen for all, but also the motion of the signing is distracting, particularly for the non-deaf.

Captioning — the projection of written text on the television screen to convey to the deaf information communicated to others by the sound track — is more useful than sign language or lip reading.[3] But captions also conceal or interfere with a portion of the normal visual display.[4] And when presented in a way that is visible to all viewers, captions (like cameo inserts of sign language interpreters) can be distracting and normally are not of benefit to the non-deaf.

Initially the Commission urged broadcasters to make use of visual materials along with aural announcements when presenting emergency bulletins, and to undertake special efforts to

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[3] Program captioning (as distinct from emergency-bulletin captioning) requires both the conversion of the aural portion of a program to a condensed written text suitable for easy reading by the deaf and the placement of the resulting text onto the broadcast tape in synchronization with the visual action. The activity requires sophisticated equipment and skilled editorial personnel and thus is costly. *See* Captioning for the Deaf, 63 F.C.C.2d 378, 384-85 (1976). Because of the time that is required to write and insert captions, there are difficulties associated with captioning live programming or taped programming that involves last-minute editing. *See id.* at 384. There may be technological breakthroughs at hand on this point. *See* Boston Globe, Mar. 2, 1982, at 31, col. 1.

[4] In order to make the text readable, captions often appear against a blacked-out portion of the screen. Even captions that are merely "written over" the picture obscure at least part of the normal visual display.

assure greater accessibility by the deaf to news, informational, and entertainment programming. *Deaf Viewers — Use of TV to Inform*, 26 F.C.C.2d 917 (1970). Although that notice was only advisory in nature, the Commission urged broadcasters to explore techniques to serve the deaf better. It concluded:

> We will observe developments in this area in the near future, and if the situation does not develop satisfactorily it may be necessary to begin rule making looking toward the adoption of minimum requirements.

Id. at 918-19. [5]

The Commission's plea soon was followed by action. In 1972, the Commission authorized the Public Broadcasting Service (PBS) to begin experiments with a captioning system known as the "Line 21" system. *See* KCET App. at 45a-46a. This system would allow captions to be transmitted in such a way that they would be visible only on receivers equipped with appropriate decoders. [6] These are called "closed" captions. [7] The closed-caption approach was a major breakthrough because it provided the deaf with special visual assistance without impairment of the normal visual transmission to non-deaf viewers. Apparently this was the key to convincing two commercial television networks (ABC and NBC) for the first time to offer

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[5] The Commission subsequently adopted rules requiring all television stations to broadcast emergency information both aurally and visually or only visually. Emergency Messages — Television, 61 F.C.C.2d 18 (1976), *amended*, 62 F.C.C.2d 565 (1977) (codified at 47 C.F.R. § 73.1250).

[6] The decoding circuitry necessary to adapt an existing television receiver costs less than $300. *See* Wash. Post, Feb. 17, 1982, at C12, col. 2. Assuming a 10-year useful life for a decoder, the cost of the circuitry necessary to access closed captions is less than 10 cents per day per receiver.

[7] "Closed captions" are to be contrasted with "open captions," which are visible on all television receivers.

captioned programming to supplement that planned for public television. *See* KCET App. at 66a.

When the public television experiment bore fruit, the Commission permitted the general use of closed captioning. *Captioning for the Deaf*, 63 F.C.C.2d 378 (1976). Although acknowledging that "it is of the utmost importance that the hearing-impaired . . . enjoy the tremendously powerful television medium," *id.* at 388, the Commission did not make captioning mandatory:

> We must, however, make it absolutely clear to the public and to the licensees that our decision herein does not make captioning obligatory. . . . We believe that licensees can and will be responsive to the needs of its viewers, but it is still the responsibility of each licensee to determine how it can most effectively meet those needs.

Id. at 389. Rather, the Commission adopted a policy allowing the Line 21 system's use so as to

> promote [its] development . . . and secure its benefits for the hearing-impaired community and, at the same time, provide for more efficient use of Line 21. We are persuaded that the approach we have taken will encourage continued development of technology for using the vertical interval [of the television signal] and will permit development of services of interest to both the hearing-impaired and a broader segment of the population, thereby expanding the potential market for decoders and promoting the prospect for making such devices available at minimum cost.

Id. at 388. The Commission thus struck a practical balance which it believed would encourage more near-term service for the deaf without disrupting service for the non-deaf and would provide the flexibility necessary to accommodate technological developments.

The subsequent years have seen advances in both service and technology. On the one hand, the special Line 21 decoders

became available from Sears, Roebuck & Co. with no mark-up for profit. *See* KCET App. at 66a. Programming using the Line 21 technology increased substantially. In March 1980, PBS and two of the commercial networks (ABC and NBC) began to provide up to 20 hours per week of closed-captioned programming. *See id.* at 8a. By February 1982, this had increased to substantially more than 31 hours per week.[8]

On the other hand, a possible new means to serve the deaf appeared in the form of "teletext," another technology for using the television signal to transmit special visual material in addition to regular programming. *See Proposed Authorization of Transmission Teletext by TV Stations,* 46 Fed. Reg. 60,851 (1981). Noting that teletext may have "the capability of providing captioning services [for the deaf] that are in many respects superior to those of the [Line 21] captioning system and also offers many new features with potential value for all television users," *id.* at 60,853, the Commission has proposed to authorize teletext and to allow competition and market forces to shape its services and technology.[9] *Id.* at 60,852-53.

In summary, the Commission has been sensitive to the needs of the deaf. For over a decade, it has encouraged broadcasters to

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[8] By February 1982, PBS was averaging approximately 18 hours a week of closed-captioned programming, not including reruns and special programming. The ABC television network was averaging about 8 1/2 hours a week of closed-captioned entertainment shows, in addition to a variety of sports events, "Afterschool Specials," and a network evening news show. The NBC television network was averaging 4 1/2 hours of closed-captioned programs, in addition to occasional special programs. *See* Wash. Post, Feb. 17, 1982, at C12, col. 2.

[9] In addition to closed captioning of television programs for the deaf, other applications for teletext "include weather reports, news, comparative shopping prices, . . . community bulletins, . . . commercial data and messages." *Id.* at 60,852. (Unlike closed captioning of programs, each of these other textual services would completely replace the normal picture if a viewer chose to display it.) In part because of the promise of the emerging teletext systems, the NBC television network has recently decided to termin-

expand service to the deaf.[10] But it has avoided establishing rigid requirements that could freeze or inhibit innovation in a still evolving technology. The wisdom of this approach may be measured by the increase in programming for the deaf and by the technological progress.

II. PROCEEDINGS ON COMMUNITY'S 1977 LICENSE RENEWAL APPLICATION FOR KCET.

A. Commission Proceedings.

Gottfried's petition to the Commission concerning Community's 1977 license renewal application alleged that KCET had not made adequate efforts to ascertain the needs of the deaf through consultations with their representatives. Gottfried also asserted that KCET had failed to offer sufficient programming devoted to the aurally handicapped, focusing on KCET's handling of the "Captioned ABC Evening News," a public television rebroadcast of the regular ABC network news program to which open captions had been added and commercials deleted. Gottfried alleged that KCET should have begun broadcasting the program earlier in the license term and should have broadcast it during "prime hours."[11] D.C. Cir. J.A. at 25. *See also id.* at

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ate its Line 21 captioned programming. *See* Wash. Post, Feb. 17, 1982, at C12, cols. 2, 3. Pointing to its $1 million annual captioning costs and the limited sale of decoders (43,000), which suggested a lack of demand for the service, NBC questioned the continuation of its Line 21 activities. *See id.* The CBS television network has never participated in the Line 21 system because of the promise of teletext. *See id.* KCET has engaged in active teletext experimentation, *see* 46 Fed. Reg. at 60,854 & nn.13, 14, as well as extensive Line 21 closed-captioned broadcasting.

[10] *See also* Paging Service for Handicapped Persons, 84 F.C.C.2d 750 (1981) (tactile paging for deaf, blind, and physically handicapped); Telecommunication Services for the Deaf and Hearing-Impaired, 67 F.C.C.2d 1602 (1978) (expansion of teletype service (TTY) as a substitute for telephone service).

[11] KCET began broadcasting the "Captioned ABC Evening News" in May, 1977, and presented it at approximately 11:30 p.m. and again at 6:30 a.m. the following morning. D.C. Cir. J.A at 106. Gottfried alleged that

137-44. Finally, Gottfried's petition included a general assertion that KCET had violated Section 504 of the Rehabilitation Act. [12] Gottfried filed similar petitions at the same time challenging the license renewals of seven Los Angeles commercial stations. KCET App. at 47a-49a.

In response, KCET detailed its substantial efforts both to ascertain the needs of, and to provide special programming for, the deaf during the 1974-77 license term. KCET had broadcast more than 960 programs for the deaf which had subtitles or captions, were accompanied by sign language interpretations, or, in rare instances, contained no spoken words. [13] In addition, it had broadcast several special programs on substantive issues that were of particular concern to the deaf. *See* D.C. Cir. J.A. at 109-10. Because Gottfried's Section 504 allegation was so vague and unsupported, KCET filed only a general denial and observed that the Commission was not the appropriate forum for Section 504's enforcement. *Id.* at 113.

The Commission concluded that the petitions failed to raise any substantial or material question under the public interest standard of the Communications Act. [14] KCET App. at 53a. By

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KCET "insisted upon broadcasting [the] program in an inappropriate time frame, knowing full well that this will ill-serve the community at which it was aimed." *Id.* at 28.

[12] Section 504 provides in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794.

[13] These included the "Captioned ABC Evening News," "Zoom," "Once Upon a Classic," "Nova," films of Ingmar Bergman, "The Tribal Eye," "Masterpiece Theatre," "Adams Chronicles," "President Carter's Clinton, Massachusetts Town Meeting," and many others. D.C. Cir. J.A. at 109.

[14] The Communications Act provides that the Commission shall grant an application for renewal if it determines that "the public interest, convenience, and necessity" will thereby be served. 47 U.S.C. §§ 307(a), (d), 309(a). This is termed the "public interest standard."

way of background, the Commission traced its efforts to encourage and facilitate special television services for the deaf. However, because of the "many unanswered questions," both "technical and financial," the Commission stated that "there is no requirement that any television licensee — commercial or non-commercial — provide open or closed captioning or any other form of special visual program material [for the deaf] other than for broadcasting emergency information."[15] KCET App. at 46a-47a.

As to Gottfried's Rehabilitation Act contention, the Commission found that it was not the proper agency to enforce Section 504 even if it were applicable to KCET.[16] Consistent with its longstanding policy concerning similar matters, the Commission made clear that if a Section 504 violation were

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[15] The Commission discussed some of the special problems surrounding programming for the deaf:

> For such programming to be effective, it must offer some specific form of visual communication: sign language interpretations, captioning, or extensive utilization of charts, signs, and facial closeups to permit lip reading. Even sign language and lip reading efforts, according to Gottfried, serve to limit the number of deaf and hearing impaired since many do not effectively understand these methods.

KCET App. at 51a. Gottfried pressed for mandatory open captioning. *See* D.C. Cir. J.A. at 282.

[16] Enforcement of Section 504 was then and is now committed to agencies providing federal financial assistance, subject to the general responsibility of the Secretary of HEW then, and the Attorney General now, to coordinate the implementation. Exec. Order No. 11,914, 45 C.F.R. Part 85, App. A, at 374 (1980), *revoked and replaced by* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980). Gottfried alleged that the Commission provided federal financial assistance when it granted broadcast station licenses. The Commission rejected that contention, KCET App. at 60a-61a, the Court of Appeals affirmed, KCET App. at 28a-33a, and this Court denied Gottfried's petition for writ of certiorari seeking review of that issue, Gottfried v. FCC, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982).

found by a responsible agency, it would take appropriate action. KCET App. at 52a. [17]

Gottfried's petition for reconsideration largely repeated the earlier charges and, after careful examination, was denied. KCET App. at 55a. In particular, the Commission held that a Section 504 challenge to KCET's license renewal was premature in light of Gottfried's then pending (later denied) complaint against KCET before HEW. [18] KCET App. at 61a-62a. The Commission again stressed that "[s]hould a determination later be made by the appropriate agency that KCET-TV did violate the Rehabilitation Act by failing to provide captioning, we would consider the effect of that determination upon the licensee's qualifications." KCET App. at 62a. [19]

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[17] The Commission rejected Gottfried's ascertainment charges, holding that KCET had exceeded all requirements. KCET App. at 47a-49a & n.7.

[18] The Commission learned of Gottfried's March 13, 1978, complaint before HEW only after its initial order. KCET App. at 61a. The Department of Education, HEW's successor, denied Gottfried's complaint on February 12, 1982, finding "that in its capacity as a broadcaster KCET is in compliance with Section 504 with respect to assistance it receives from this Department." Letter from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, Office of Assistant Secretary for Civil Rights, United States Department of Education, to Dr. James L. Loper, President, KCET (Feb. 12, 1982). This ruling is set out in full in the Appendix to this Brief.

[19] In the period between the Commission's original and reconsideration orders Gottfried filed a complaint in federal district court against KCET and its officers, PBS, the Corporation for Public Broadcasting, the Commission, HEW, and the California Public Broadcasting Commission alleging, *inter alia*, violation of Section 504. Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, Civ. No. CV-78-4715-R (C.D. Cal. filed Dec. 12, 1978), *appeal docketed*, Civ. App. No. 81-5952 (9th Cir. Nov. 30, 1981), *interim stay granted*, (Dec. 2, 1981), *stay pendente lite granted* (Dec. 29, 1981). Some 20 months after plaintiffs had rested, but before KCET put on its defense, the district court (Real, J.) dismissed KCET and the other private defendants pursuant to Fed. R. Civ. P. 41(b). The court found as to KCET that plaintiffs had "failed to prove that

The Commission also rejected Gottfried's reassertions of inadequate programming by KCET and the commercial stations, observing:

> Petitioners fault the Commission for not having taken action against the respondents for their failure to provide captioning or other supplementary visual material for use by the aurally handicapped. Again, petitioners object to the Commission's refusal to take action against licensees for their failure to do something that we have not required them to do. Again, it would violate our notions of fairness to retroactively apply such a new requirement.

KCET App. at 65a. (footnote omitted). Nonetheless, the Commission stressed again its awareness of the needs of the deaf. After discussing the voluntary Line 21 captioning project, the Commission observed that "important advances are being made toward achieving the goals which petitioners espouse and which we share — namely, the access of the aurally handicapped to the medium of television." *Id.* at 67a. If the advances proved unsuccessful, the Commission indicated it would consider rulemaking. *Id.*

KCET has discriminated against the deaf or hearing impaired." *Id.* (Order entered Nov. 2, 1981), *appeal docketed*, Civ. App. No. 82-5054 (9th Cir. Feb. 5, 1982). Trial continued, however, against the federal defendants, who ultimately were enjoined from funding the preparation or broadcast of programs until they provided by either regulations or contract terms for "full compliance with Section 504." In addition, the district court ruled that "closed captioning is not a reasonable alternative for deaf people." *Id.* (Findings of Fact and Conclusions of Law, entered Nov. 17, 1981; Judgment, entered Nov. 24, 1981). The federal defendants have appealed. The private defendants have filed a motion pursuant to Fed. R. Civ. P. 60(b) requesting that the district court modify its Judgment, Findings of Fact and Conclusions of Law, because of the grievous impact of the district court's action on them despite their earlier dismissal as defendants. *Id.* (filed Feb. 8, 1982). Meanwhile, the district court ordered the federal defendants to pay fees to plaintiffs' attorney (Abraham Gottfried) in excess of $430,000, an amount calculated at a rate of $262.50 per hour. *Id.* (Order entered Feb. 8, 1982).

B. Judicial Proceedings.

In the Court of Appeals for the District of Columbia Circuit (*see* 47 U.S.C. § 402(b)), Gottfried concentrated on the argument that television stations had special program obligations for the deaf that derived from an asserted interrelationship between the "national policy" reflected in Section 504 and the public interest standard of the Communications Act.

Gottfried's position was accepted, in part, by a majority of the court. Although the public interest standard applies to commercial and public television station license renewal applications alike, the court unanimously affirmed the Commission's decision as to the seven commercial stations while, by a divided vote, vacating the Commission's order as to KCET's application and remanding it for further proceedings. (Wright & Gasch, JJ.; McGowan, J., concurring in part and dissenting in part.)[20]

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[20] The result was not based on any finding of discrimination against the deaf or other violation of Section 504 by KCET. Indeed, the uncontested record evidence showed that KCET's service to the deaf during the license term far exceeded that of any of the commercial stations. Rather, the disparate treatment of KCET was said to be based on the fact that KCET, unlike the commercial stations, had been shown to be a recipient of federal funds and thus was directly subject to Section 504. KCET App. at 15a-19a, 28a-33a. The court did note that Section 504 "may evidence a general national policy of considering the concerns of the deaf within the public interest rubric" even for commercial stations and expressed the belief that "some accommodations for the hard of hearing are required of commercial stations." KCET App. at 34a-35a. Nonetheless, because commercial broadcasters did not have specific statutory obligations under Section 504, the majority decided not to require "at this time" that the "national policy" reflected in Section 504 be incorporated in the public interest standard that is applied to commercial station renewal applications. KCET App. at 35a. Judge McGowan's opinion pointed out that "form is favored over substance when commercial stations are, for this reason, spared the expense and uncertainty of renewal hearings, and a non-commercial station is not." KCET App. at 40a.

The Court of Appeals subsequently denied Gottfried's petition for an award against Community and the Commission of attorneys' fees for

Writing for the majority, Judge Wright did not dispute the Commission's finding that KCET had not violated any previously established Commission requirement to provide television service for the deaf. KCET App. at 7a, 26a. He acknowledged that there were not any interpretive guidelines by any agency to define the Section 504 obligations of public television stations. KCET App. at 9a-10a n.22. He even noted that "rulemaking might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing." KCET App. at 4a. Nonetheless, the majority rejected the Commission's approach, stating "in our view television . . . should be made available to persons with impaired hearing now." KCET App. at 15a. The court held that for public television stations the national policy reflected in Section 504 *must* be incorporated in the public interest standard of Section 309 of the Communications Act and that KCET's 1974-77 compliance with this newly defined obligation must be assessed in further proceedings on KCET's 1977 license renewal application.

Judge McGowan concurred with regard to the commercial stations, but dissented from the disparate treatment of KCET. KCET App. 38a-40a. Noting the Commission's willingness to consider Section 504 guidelines adopted by appropriate agencies when they became available, Judge McGowan argued that the benefit of their prospective operation should extend to all licensees. He observed that none of the stations

> had advance notice during their expired license terms of what was, and therefore could reasonably be, expected of them with respect to the wholly laudable, but technically

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Abraham Gottfried of $681,000, an amount calculated at the rate of $681.00 per hour. Per Curiam order (entered Nov. 12, 1981). Gottfried's petition for rehearing and suggestion for rehearing *en banc* of the fee denial (filed Jan. 11, 1982) is pending at the Court of Appeals.

> complex, objective of providing access to the hearing-impaired.

Id. at 40a. He thus opposed the "vastly different burden" that was placed on KCET than on the commercial stations. *Id.* at 38a.

Community's and the Commission's petitions for rehearing and suggestions for rehearing *en banc* were denied. (Judge McGowan voted for rehearing, and Judges Robb and MacKinnon voted for rehearing *en banc*.) KCET App. at 69a-72a.

On January 11, 1982, this Court granted petitions for writs of certiorari filed by Community and the Solicitor General on behalf of the Commission, but limited the grant of Community's petition to the second question it had presented.[21] On February 22, 1982, this Court ordered consolidation of the two cases for purposes of briefing and oral argument.

SUMMARY OF ARGUMENT

The Court of Appeals held that, as a matter of law, the national policy of Section 504 of the Rehabilitation Act (which prohibits recipients of Federal funds from discriminating against, excluding, or denying benefits to otherwise qualified handicapped persons) *must* be incorporated in the public in-

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[21] As phrased in its petition that question was: "Whether the D.C. Circuit erred by directing the FCC to incorporate the Court's expansive interpretation of Section 504 into the public interest standard of Section 309 of the Communications Act, as amended, governing Federal Communications Commission action on television station license applications and apply it to Petitioner's 1977 license renewal application." KCET also sought review of the question whether Section 504 imposes any obligation on public television stations to take affirmative action to modify broadcasts to make the aural portions accessible to the deaf in view of, *e.g.*, Southeastern Community College v. Davis, 442 U.S. 397 (1979). The Solicitor General opposed the grant of certiorari on that question, arguing that the issue was not ripe because "specific affirmative action requirements" had not yet been specified. Brief for the Federal Communications Commission in Opposition, No. 81-298, at 8 (filed Dec. 3, 1981).

terest standard of the Communications Act. This was error, for this Court has made clear that the content of a public interest standard is to be derived from the purposes of the statute in which it is embodied rather than from those of distant statutes. *E.g.*, *NAACP* v. *FPC*, 425 U.S. 662 (1976). Any other approach would impair the public interest standard in the Communications Act as the "supple instrument for the exercise of discretion" that the Congress intended for the regulation of a "dynamic" industry. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

By thus redefining for the Commission the scope and content of the public interest standard governing public television license renewals, the Court of Appeals undermined the Congressional scheme for the regulation of broadcasting. The Congress has delegated broad licensing authority to the Commission because it recognized a special need for agency expertise in the regulation of a technologically complex industry. Pursuant to that delegation, the Commission carefully has developed and articulated over more than a decade a policy concerning television for the deaf that involved its expert balancing of the operative technological and economic considerations plus the competing interests of the deaf and non-deaf. Although the Court of Appeals did not identify a single particular (other than failure to incorporate the Rehabilitation Act) in which the Commission's policy had been deficient or unreasonable, it ordered the Commission to follow a different approach.

The Court of Appeals attempted to explain its order by stating that "in our view television . . . should be made available to persons with impaired hearing now." KCET App. at 15a. In rejecting the Commission's carefully considered approach to the problem of television for the deaf, the Court of Appeals usurped authority that the Congress has delegated to the Commission. It overlooked the holdings of this Court protecting the Commission's broad discretion to determine the scope and

content of the public interest standard from over-expansive judicial review. *See, e.g., FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). The Court of Appeals exceeded its authority by substituting its judgment of the public interest for the Commission's.

Even if the Court of Appeals was correct in interpreting the scope and content of the public interest standard, by ordering the Commission to determine the adequacy of KCET's service to the deaf in the 1974-77 term in further proceedings on the station's 1977 renewal application, it intruded impermissibly on the Commission's discretion to determine how best to apply and enforce that new standard. *See, e.g., FCC* v. *WNCN Listeners Guild, supra; FCC v. National Citizens Committee for Broadcasting, supra*. Thus, the court committed two additional errors.

First, the Court of Appeals did not allow the Commission to follow its customary approach with regard to statutes that, like Section 504, are to be enforced by other agencies. The Commission should have been permitted to await guidance from appropriate enforcement agencies as to any Section 504 obligations of KCET or other public television stations to provide programming with special visual aids for the deaf. Such an approach would have faithfully reflected the scheme of enforcement of Section 504 that the Congress intended, facilitated economy and comity among Federal agencies, and served to prevent the imposition of possibly inconsistent requirements on public television stations.

Second, despite acknowledging that "rulemaking might be a better, fairer, and more effective vehicle" for introducing new requirements for service to the deaf, KCET App. at 4a, the Court of Appeals inexplicably required the Commission to follow a different course. The Commission was not allowed

even to consider whether to impose only on a prospective basis the new substantive requirements directed by the Court of Appeals. Yet, as this Court held in *FCC* v. *National Citizens Committee for Broadcasting, supra,* the Commission's broad authority to change licensing policies on a prospective basis is entitled to judicial deference. In denying the Commission its procedural options, the Court of Appeals introduced the substantial burdens that case-by-case assessment of the past conduct of hundreds of public television stations would impose on the Commission and the licensees, as well as the patent unfairness of measuring KCET's long-past conduct by brand new requirements of the very type the Commission previously had declined to impose. *See Captioning for the Deaf,* 63 F.C.C.2d 378, 389 (1976).

Each of the Court of Appeals' errors requires that its judgment as to KCET be reversed.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY EXPANDING THE PUBLIC INTEREST STANDARD IN A WAY THE COMMISSION HAD REASONABLY REJECTED.

The Court of Appeals held that the Commission was obliged to incorporate the "national policy" of Section 504 of the Rehabilitation Act in the public interest standard of Section 309 of the Communications Act. The court's expansion of the substantive standard that governs the Commission's license renewal actions was an impermissible intrusion on the broad discretion that the Congress has granted to the Commission. The court's action interfered with a core purpose of the Congressional delegation — to allow an "expert body" to "maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940). Moreover, the decision reflected a fundamental misunderstanding of the scope of the public interest standard of the Communications Act. The

Congress never intended that the standard *must* incorporate the myriad policies reflected in other and distant statutes. The court's novel "incorporation" theory trenches upon the function of the Commission to interpret the public interest standard and would expand that standard beyond all sensible bounds.

A. The Court of Appeals Intruded Impermissibly on the Commission's Authority to Define the Scope and Content of the Public Interest Standard.

1. The Congress Gave the Commission Broad Authority and Made it Subject to Limited Judicial Review.

In the early 1920's, broadcasting in the United States was in a state of technological "confusion and chaos." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 212 (1943). The pressing need for legislation dealing with the problems was described to the Congress by then Secretary of Commerce Herbert Hoover:

> There is no problem of more technical complexity, or that has more indeterminate factors, at the present time, than the one you have under consideration. It is urgent that we have an early and vigorous reorganization of the law in Federal regulation of radio. . . .
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> . . . .
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> The problems involved in Government regulations of radio are the most complex and technical that have yet confronted Congress. We must preserve this gradually expanding art in full and free development; but for this very purpose of protecting and enabling this development and its successful use, further legislation is absolutely necessary.

Hearings before the Committee on the Merchant Marine and Fisheries on H.R. 7357, 68th Cong., 1st Sess. 8-9 (1924).

The Congress ultimately responded with a statute to provide a "comprehensive scheme of control over radio communication." *National Broadcasting Co.* v. *United States, supra* at

213. A key element of that scheme was to vest the Commission with "wide licensing and regulatory powers." [22] *Id.* The Congress perceived that a Commission with extensive and continuing authority would master the complex technical problems associated with evolving technology and would develop a breadth and depth of understanding that would allow sound and farsighted decisionmaking. *See FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940).

In the critical broadcast station licensing area, the Communications Act requires periodic applications for license renewal, 47 U.S.C. § 307(d), which the Commission may grant only if "the public interest, convenience and necessity" would thereby be served, *id.* §§ 307(a), (d), 309(a). The Act does not further define that standard. Rather, this Court has characterized it as " 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.' " *FCC* v. *WNCN Listeners Guild*, 450 U.S.

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[22] The Radio Act of 1927, ch. 169, 44 Stat. 1162, created a Federal Radio Commission with the same extensive powers that the Commission exercises today. The Radio Act provided, however, that many of the Radio Commission's powers would vest in the Secretary of Commerce one year after the Commission's first meeting. *Id.* § 5, 44 Stat. 1164. Concerns were expressed that a full-time and permanent commission was essential because "radio affairs embrace highly technical and complex questions," and "the matters pertaining thereto cannot be intelligently and efficiently determined without a broad and accurate knowledge of radio problems." H.R. Rep. No. 464, 69th Cong., 1st Sess. 19 (1926) (minority views); *see* S. Rep. No. 772, 69th Cong., 1st Sess. 2 (1926). Subsequent legislation extended the Commission's authority "until such time as is otherwise provided by law." Act of December 18, 1929, ch. 7, § 1, 46 Stat. 50; *see* Act of March 28, 1928, ch. 263, § 1, 45 Stat. 373; Act of March 4, 1929, ch. 701, § 1, 45 Stat. 1559. The full initial powers of the Federal Radio Commission were ultimately transferred to the Federal Communications Commission. *See* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 2 (1934). *See generally* National Broadcasting Co. v. United States, 319 U.S. 198, 210-214 (1943).

582, 593 (1981), *quoting FCC* v. *Pottsville Broadcasting Co.*, *supra* at 138. Thus, this Court has emphasized that "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978).

Not only has the Congress delegated broad authority to the Commission, but also it has sharply limited judicial review of Commission actions.[23] Reviewing courts are to be guided by the " 'venerable principle that the construction of a statute by

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[23] Section 16 of the Radio Act of 1927, *supra* note 22, originally authorized the Court of Appeals, when reviewing an action of the Radio Commission, to "alter or revise the decision appealed from and enter such judgment as to it may seem just." This section was understood to allow the Court of Appeals to make its own determinations of how the public interest might best be served. *See* Chicago Fed'n of Labor v. FRC, 41 F.2d 422, 423 (D.C. Cir. 1930); Great Lakes Broadcasting Co. v. FRC, 37 F.2d 993, 995 (D.C. Cir. 1930). The Court of Appeals thereby became "a superior and revising agency," which led this Court to decline to review its determinations. FRC v. General Elec. Co., 281 U.S. 464, 467 (1930). Because of this Court's decision and because the Court of Appeals was acting as a "superradio commission" that was "substituting its judgment and discretion for that of the Federal Radio Commission," 72 Cong. Rec. 11,530 (1930) (remarks of Rep. Davis), the Congress amended the Radio Act to limit judicial review "to questions of law" and to make "findings of fact by the commission, if supported by substantial evidence . . . conclusive unless it shall clearly appear that . . . [they] are arbitrary or capricious." Act of July 1, 1930, ch. 788, 46 Stat. 844, 845. This approach was continued in § 402(e) of the Communications Act of 1934, ch. 652, 48 Stat. 1064, 1094, which was later amended so as to apply the analogous standards of judicial review under the Administrative Procedure Act to Commission decisions. Act of July 16, 1952, ch. 879, § 14, 66 Stat. 711, 720. This Court has held that under the modern legislation the Court of Appeals should not act as a superradio commission, but rather should undertake limited review consistent with the judicial function. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 (1981); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38, 141 (1940); FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276 (1933).

those charged with its execution should be followed unless there are compelling indications that it is wrong.' " *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973), *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). *See FCC* v. *Pottsville Broadcasting Co.*, *supra* at 141. As recently as last Term this Court emphasized that "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC* v. *WNCN Listener's Guild*, *supra* at 596. Thus, "[t]he Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside." *Id.* A court must also allow the Commission to rest its decisions on judgment and prediction, in recognition of the fact that "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC* v. *National Citizens Committee for Broadcasting*, *supra* at 814, *quoting FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

2. The Commission Properly Exercised its Authority and the Court of Appeals Exceeded its Proper Role.

Whether and how best to provide the deaf with access to television programming is exactly the type of public interest issue that the Congress intended to leave to the Commission's reasonable exercise of its expert judgment. Resolution of the issue requires an understanding of complex technology and how that technology might evolve. It requires an appreciation of the financial impact of any particular approach on both broadcasters and the deaf. And it requires a careful weighing of the competing interests of the deaf and the non-deaf.

The record shows deep Commission concern with and action on the problem for over a decade. *See supra* pp. 5-9. The Commission has attempted to maintain a sensible balance whereby programming for the deaf is more available, new

technology is allowed to flourish and develop, and the interests of the non-deaf majority are protected. [24] Thus, the Commission has continued "to encourage broadcast licensees . . . to make television a truly valuable medium for the hearing-impaired," [25] has indicated rulemaking might be undertaken if progress is not adequate, [26] but has declined to set mandatory general requirements that could deter innovation. [27]

The success of the Commission's approach is reflected in both the increase in programming for the deaf using existing

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[24] Gottfried has argued that the Commission should require open captioning for virtually all programming. This Court has noted, however, that the Commission is obligated "to secure the maximum benefits of radio to *all* the people of the United States." National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943) (emphasis added). Mandatory open captions would block part of the normal visual display and can be distracting. *See supra* p. 5. Thus, the Commission's decision not to require captions in general programming is fully consistent with its obligations. Where mandatory captions have been found to be appropriate — in the broadcast of emergency information — the Commission has not hesitated to require them. *See supra* note 5.

[25] Captioning for the Deaf, 63 F.C.C.2d at 389.

[26] KCET App. at 67a; Deaf Viewers — Use of TV to Inform, 26 F.C.C.2d 917, 918-19 (1970).

[27] If, for example, the Commission were to require the use of Line 21 technology, it would have to reserve spectrum space exclusively for that use. But, as the Commission found, such a reservation would "possibly defer future technological developments, such as a teletext-type system, which would provide a larger number of services, including captioning, to a larger percentage of the public." Captioning for the Deaf, 63 F.C.C.2d at 388. Thus, although finding "there is simply no easy solution," *id.*, the Commission concluded that the best approach was not to *reserve* Line 21, but rather to *allow* its use for captioning. In the Commission's view, such an approach promised "benefits for the hearing-impaired" and, at the same time, would "encourage continued development of technology." *Id. See also* Proposed Authorization of Transmission Teletext by TV Stations, 46 Fed. Reg. 60,851, 60,852-53 (1981) (proposing similar strategy for teletext so that the market will determine services and technology).

technology and the technical advances that suggest even greater services for the deaf and others in the future. *See supra* pp. 7-8. Indeed, the Commission has established the content of the public interest standard as it relates to the deaf with an eye to complex technical considerations — to the "dynamic aspects of radio transmission" — and it is in exactly such matters that judicial deference to an expert administrative agency is most appropriate. *FCC* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 138; *see FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *Board of Trade* v. *United States*, 314 U.S. 534, 548 (1942); *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

The Court of Appeals, without a nod to the complex technical and policy considerations the Commission had evaluated, chose to ignore the Commission's expert judgment, and to impose its own policy. It took this action despite the reasonable foundations for the Commission's policy and its full and careful explanation of those foundations. Indeed, the Court of Appeals did not identify a single particular (other than failure to incorporate the Rehabilitation Act) in which the Commission's approach was unreasonable.

The instant case thus bears a striking resemblance to *FCC* v. *WNCN Listeners Guild*, *supra*, in which this Court found it necessary to step in to protect the Commission's judgment from impermissible judicial intrusion and second-guessing not unlike the type the Congress had found impermissible and undesirable in the early 1930's. *See supra* note 23. In *WNCN Listeners Guild*, the Commission had decided to rely on market forces to promote diversity in radio entertainment programming, and hence it had declined to review entertainment format changes in the licensing process. There, as here, the Commission had concluded that the public interest was best served by not considering certain matters in licensing proceedings. There, as here, the Court of Appeals disagreed, holding that the Commission was obliged to review such matters under the public

interest standard. *WNCN Listeners Guild* v. *FCC*, 610 F.2d 838 (D.C. Cir. 1979) (en banc). And there, as here, the Court of Appeals attempted to justify its intrusion on Commission authority by claiming its action involved a matter of "law" rather than "policy." *Compare id.* at 854-55 *with Gottfried* v. *FCC*, KCET App. at 19a. *See also FCC* v. *WNCN Listeners Guild, supra*, 450 U.S. at 592. This Court observed:

> [T]he Commission is . . . vested with broad discretion in determining how much weight should be given to [the goal of promoting program diversity] and what policies should be pursued in promoting it. The [Communications] Act itself, of course, does not specify how the Commission should make its public-interest determinations.

Id. at 600. In light of the broad delegation to the Commission on matters within its expert competence, this Court reversed the Court of Appeals and upheld the Commission's action. [28] So too here, the Commission's judgment should be given the "substantial judicial deference," *id.* at 596, to which it is entitled.

B. The Public Interest Standard Does Not Automatically Incorporate the Policy of Section 504 of the Rehabilitation Act.

The Court of Appeals attempted to justify its intrusion on the Commission's authority by a highly questionable analysis.

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[28] Justice Marshall, joined by Justice Brennan, dissented because of the absence of a "safety valve" whereby the Commission could reconsider its views. 450 U.S. at 609-12. In this respect, the present case differs significantly from *WNCN Listeners Guild*. First, the instant case arises from an individual adjudication and thus the Commission could modify its position in acting on a license application presenting different facts. Indeed, it emphasized it would evaluate KCET's future licensing if there were a finding of a KCET violation of Section 504 by an agency with authority to enforce it. KCET App. at 52a, 62a. Second, the Commission has indicated it will continue to monitor progress and may alter its policies accordingly through rulemaking. KCET App. at 67a. Thus, "safety valves" are in place with regard to programming for the deaf.

After concluding that public television stations, as recipients of federal financial assistance, are subject to Section 504 of the Rehabilitation Act, the court held that "the FCC's 'public interest' mandate *must* be construed to incorporate the national policy of nondiscrimination against the [deaf]" because "[s]urely the policy of [the Rehabilitation Act] falls well within the broad purposes of the Communications Act." KCET App. at 19a, 20a-21a (emphasis added). The court then directed the Commission to assess under the public interest standard the adequacy of efforts by KCET (and presumably other public television stations) to make television accessible to the deaf, as purportedly required by the "national policy" of the Rehabilitation Act. Although other parts of the court's analysis are highly dubious, we focus here on the novel "incorporation" theory. [29]

In *NAACP* v. *FPC*, 425 U.S. 662 (1976), this Court considered whether the references to the "public interest" in the Federal Power Act, 16 U.S.C. § 791a *et seq.*, and the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, authorized the Federal Power Commission to issue rules prohibiting discriminatory employment practices by its regulatees. The Court observed:

> This Court's cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.

Id. at 669. The Court then examined the Gas and Power Acts and found that their chief purpose was to encourage plentiful supplies of natural gas and electricity at just and reasonable

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[29] KCET does not concede that Section 504 requires it to take the substantial and expensive affirmative action necessary to modify its broadcast activity to make its programming accessible to the deaf. *See infra* note 38. Litigation with Gottfried on that issue continues in other fora. *See supra* note 19.

rates. Accordingly, despite the strong public policy to remove the blight of discriminatory employment practices from our society, the Court concluded that "[t]he use of the words 'public interest' in the . . . Acts is not a directive to the [Federal Power] Commission to seek to eradicate discrimination." *Id.* at 670. [30]

The Court of Appeals disregarded the central teaching of *NAACP* v. *FPC* — namely, that the required content of the public interest standard depends on the purpose of the Act in which it is embodied rather than the purposes of distant statutes. [31] The Court of Appeals also disregarded the long line of cases to similar effect. *See, e.g., FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94-95 (1953) (FCC may not incorporate the "national policy in favor of competition" into the public interest standard without independently concluding that competition is desirable in light of its own evaluation of public and industry needs); *National Broadcasting Co.* v. *United States, supra*, 319 U.S. at 219 (FCC not empowered by public interest

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[30] Even if the FPC had been *authorized* under the public interest standard to combat discrimination, it by no means follows that it was *compelled* to do so. As we have seen, the definition of the content of the standard is largely a matter for an agency's expert judgment.

[31] The Court of Appeals did refer, KCET App. at 21a, to a footnote in *NAACP* v. *FPC* that dicusses the Federal Communications Commission's regulations concerning discriminatory employment practices by its regulatees. 425 U.S. at 670 n.7. But that footnote hardly supports the Court of Appeals' expansive incorporation theory; this Court stated that the Commission's "regulations can be *justified . . . under the Communications Act of 1934* . . . to ensure that its licensee's programming fairly reflects the tastes and viewpoints of minority groups." *Id.* (emphasis added). In short, the Court looked for authority derived solely from the Communications Act, not a distant statute, to support the regulations. *See* Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 531 (2d Cir. 1977). Moreover, even with regard to employment discrimination, the Court of Appeals has recognized that a finding of illegal practices does not necessarily raise an issue under the Communications Act. National Org. for Women v. FCC, 555 F.2d 1002, 1017-18 (D.C. Cir. 1977).

standard to consider "[g]eneralities unrelated to the living problems of radio communication"); *FRC* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) (identical public interest requirement of Communications Act's predecessor statute "to be interpreted by its context"); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932) (the term "public interest" takes meaning from "[t]he purpose of the [Transportation] Act, the requirements it imposes, and the context of the provision"). *See also New Haven Inclusion Cases*, 399 U.S. 392, 432 (1970). [32]

The wisdom of the reasoning underlying *NAACP* v. *FPC* and similar cases is underscored by consideration of the consequences of the Court of Appeals' different approach here. If the public interest standard of the Communications Act *must* in-

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[32] The Court of Appeals purported to find authority for its incorporation theory from opinions of this Court and others. In fact, none supports the position the Court of Appeals adopted. In McLean Trucking Co. v. United States, 321 U.S. 67 (1944), this Court concluded that the transportation policy embodied in the Interstate Commerce Act "is the Commission's guide to 'the public interest'," *id.* at 82, and that the Act "did not import the general policies of the anti-trust laws as a measure of [the] permissibility" of a merger of motor carriers, *id.* at 85. Moreover, the *McLean Trucking* Court deferred to the ICC's interpretation of its public interest mandate by approving its action. *Id.* at 89-90. The other cases cited by the Court of Appeals, to the extent relevant at all, are similar. *See* FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968); City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956). These cases stand solely for the proposition that a regulatory agency must, to some degree, accommodate the policies of the antitrust laws when enforcing statutes that by express terms, legislative history, or agency interpretation *require* antitrust analysis; none would support the judicially forced incorporation of the policies of distant statutes. Moreover, these cases reinforce the broad authority of a regulatory agency to define its public interest standard according to the purposes of its act without being bound to include policies reflected in distant statutes. *See, e.g.*, Northern Natural Gas Co. v. FPC, *supra* at 961.

corporate the policies of the Rehabilitation Act, then it similarly could be required to include policies from any distant statute that the Court of Appeals might find is "[s]urely . . . within the broad purposes of the Communications Act." KCET App. at 20a-21a. If so, the public interest standard would no longer be the "supple instrument for the exercise of discretion" by an expert agency that the Congress intended. *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 138.

Over the many years it has been dealing with the issue, the Commission has left no doubt about its view that the public interest standard of the Communications Act itself encompasses television for the deaf. Repeatedly, the Commission has considered whether, under the public interest standard, to require television stations to provide general programming with special visual aids for the deaf. Repeatedly, it has been the Commission's expert judgment not to do so, but rather to limit *requirements* for visual aids for the deaf to the obligation of both commercial and public television stations to provide visual emergency notices.[33] *See supra* note 5. By affirming the Commission's action with regard to the commercial stations, the Court of Appeals has conceded that the obligation to serve the deaf arising directly from the public interest standard of the Communications Act does not exceed the requirements already

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[33] In different policy contexts the Commission has imposed requirements with regard to matters affecting minorities. For example, the Commission has established obligations to prevent employment discrimination by its licensees on the basis of race, color, religion, national origin or sex. *See* Nondiscrimination in Employment Practices (Broadcast), 60 F.C.C.2d 226 (1976). Of course, in these other contexts there are no technological considerations or countervailing public interests comparable to those that surround programming for the deaf, and thus more aggressive actions could be justified. *See also* Equal Employment Opportunity — Handicapped, 76 F.C.C.2d 86, *recon. denied,* 80 F.C.C.2d 299 (1980), *petition for review pending sub nom.* California Ass'n of the Physically Handicapped, Inc. v. FCC, No. 80-7157 (9th Cir. filed Mar. 26, 1980).

defined by the Commission. Because the sole basis for the Court of Appeals' disparate treatment of a public station arises from its novel (and erroneous) incorporation of the policies of the distant Rehabilitation Act into the Communications Act, the judgment of the Court of Appeals as to KCET must be reversed.

II. THE COURT OF APPEALS INTRUDED IMPERMISSIBLY ON THE COMMISSION'S AUTHORITY TO DETERMINE HOW BEST TO IMPLEMENT THE PUBLIC INTEREST STANDARD EVEN IF THE COURT OF APPEALS WAS CORRECT AS TO ITS SCOPE AND CONTENT.

This Court has recognized not only the Commission's broad authority to define substantive policy that will maximize the benefits of broadcasting, but also "that Congress had granted the Commission broad discretion in determining *how* that goal could best be achieved." *FCC* v. *WNCN Listeners Guild, supra,* 450 U.S. at 594 (emphasis added); *cf. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519 (1978) (finding broad agency discretion to define internal procedures). The authority to choose the method by which to implement policy is a corollary of the authority to define the policy. This Court has therefore held that " 'the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes back to the Commission for reconsideration.' " *FCC* v. *National Citizens Committee for Broadcasting, supra,* 436 U.S. at 792-93 n.15, *quoting FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952).

Even if the public interest standard does require special visual programing for the deaf because of incorporation of Section 504, the Court of Appeals impermissibly foreclosed the Commission from considering and selecting the method for enforcing the new requirement. The court should have allowed the Commission to await guidance from the agencies responsible for enforcing Section 504. The court also should have allowed the Commission the discretion to introduce the new obligations prospectively through general rulemaking proceed-

ings, rather than retrospectively through specific license adjudications, of which KCET's presumably would be only the first.

A. The Court Of Appeals Should Not Have Denied the Commission Discretion to Rely on Guidance from Agencies Charged with Enforcing Section 504 of the Rehabilitation Act.

Noting that the obligation to enforce Section 504 rested with other agencies, *see supra* note 16, the Commission observed that if "a determination [were] made by the appropriate agency that KCET-TV did violate the Rehabilitation Act by failing to provide captioning, we would consider the effect of that determination upon the licensee's qualifications." KCET App. at 62a. Absent such a determination, the Commission held that Gottfried's petition was "premature." *Id.* The Commission thus followed its customary approach with regard to statutes enforced by other agencies. *See FCC Form 303*, 59 F.C.C.2d 750, 757-63, *recon. granted in part and denied in part*, 61 F.C.C.2d 27, 30-31 & n.4 (1976).[34]

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[34] The Commission has explained its policy as follows:

> Normally, we have declined to explore matters currently being litigated before the courts or to duplicate the ongoing investigative efforts of other government agencies charged with the responsibility of interpreting and enforcing the laws in question. Our restraint in this respect has not been predicated upon the unlikelihood of proving the violation of law. Indeed, conduct which does not contravene law may still run afoul of the public interest standard . . . . By our forbearance we have sought to maintain a proper working relationship with the judiciary and other governmental agencies and to avoid burdening applicants with unnecessary, costly multiple proceedings.

59 F.C.C.2d at 763; *see* National Org. for Women v. FCC, 555 F.2d 1002, 1016, 1017-18 (D.C. Cir. 1977); Taft Broadcasting Corp., 76 F.C.C.2d 45, 50 (1980); FCC & EEOC — Memorandum of Understanding, 70 F.C.C.2d 2320, 2328 (1978), *petition dismissed*, National Ass'n of Broadcasters v. FCC, 46 Rad. Reg.2d (P&F) 1175 (D.C. Cir. 1979). *See also* Violation by Applicants of Laws of United States, 42 F.C.C.2d 399, 402-03 (1951). Gottfried's multi-barrelled attacks (HEW, Commission, district court and various other federal agencies) threaten to burden KCET with further "costly multiple proceedings" if the traditional Commission policy of deferral is foreclosed.

There are sound reasons supporting the Commission's approach. First, it faithfully reflects the scheme of enforcement of the Rehabilitation Act that the Congress intended. The legislative history shows that the Congress looked to the agencies that provide financial assistance, not to other agencies such as the Commission, to adopt regulations to guide compliance in specific contexts and then to enforce the Act. [35] No such regulations had been adopted regarding special visually assisted television programming for the deaf at the time the Commission or the Court of Appeals acted in this case.

Second, the Commission's approach is reinforced by considerations of economy and comity among governmental agencies. Two chief sources of federal financial assistance for public television — the Department of Commerce and the Department of Education — have established procedures for adjudicating

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[35] Although the Rehabilitation Act itself does not specify a method of enforcement, the Congress clearly contemplated that enforcement would be undertaken by agencies extending financial assistance. Section 504 was modelled on the anti-discrimination language of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (relating to race, color, or national origin) and § 901 of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (relating to sex), both of which are enforced by "[e]ach Federal department and agency which is empowered to extend Federal financial assistance." 20 U.S.C. § 1682; 42 U.S.C. § 2000d-1. The close relationship among the acts shows that a similar method of enforcement was intended. *See* Cannon v. University of Chicago, 441 U.S. 677, 694-703 (1979). This was confirmed by Congressional statements in enacting amendments to the Rehabilitation Act. *See* S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390. *See also* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2982, 2983. As a result, the executive branch is implementing the enforcement scheme that the Congress intended. *See* Exec. Order No. 11,914, 45 C.F.R. Part 85, App. A, at 374 (1980), *revoked and replaced by* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

complaints of noncompliance with Section 504.[36] Just such an administrative complaint was prosecuted by Gottfried against KCET before the Department of Education, and KCET was vindicated. *See supra* note 18 and Appendix. To require the Commission to determine KCET's Section 504 compliance in the license renewal process would be redundant and could lead to conflict in evaluating the very facts and laws that are at the core of Gottfried's multi-forum complaints against KCET.

Third, the Court of Appeals' decision increases the duplication of responsibility to define the obligations of Section 504 and thus may force public television to face additional possibly inconsistent requirements.[37] The likelihood of such confusion looms large. There is a serious question whether Section 504 requires public television to provide any special visual aids to make programming accessible to the deaf.[38] Even if Section

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[36] *See* 34 C.F.R. § 104.61 (1981) (making the Department of Education's Title VI procedures applicable to Section 504). The Department of Commerce has issued proposed regulations, 43 Fed. Reg. 53,765 (1978), and until these are effective, it is operating under the regulations initially issued by HEW. 46 Fed. Reg. 37,068 (1981); *see* 45 C.F.R. § 84.61 (1980) (making HEW's Title VI procedures applicable in Section 504 proceedings).

[37] Such inconsistency may be a consequence of Gottfried's multi-barrelled litigation strategy. As a result of the decision of the Court of Appeals, the Commission would be required in acting on license applications to define the obligations of public broadcasters to provide programming for the deaf. At the same time, as a result of Gottfried's district court litigation, *see supra* note 19, the funding agencies would be required to proceed immediately to issue rules to define those same obligations. Although the Attorney General has responsibility for coordinating the funding agencies' rulemaking efforts, *see supra* note 16, and thereby can help to avoid conflicts among them, he has no similar authority over the Commission's licensing determinations.

[38] There are several persuasive arguments that Section 504 does not impose obligations on stations to provide special visual aids.

First, the section protects only an "otherwise qualified handicapped individual" in federally funded programs. This Court has held that this refers to a person "who is able to meet all of a program's [legitimate] requirements

504 did apply, defining the obligations of public television would prove difficult. This Court has observed that "the line between a lawful refusal to extend affirmative action and illegal

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in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (emphasis added). Because television is inherently both an aural and visual medium, a deaf person does not "possess . . . abilities that permit him to meet the requirements" of its enjoyment. *Id.* at 405-06 n.6. Thus, just as a school did not act unlawfully by denying a deaf person admission to a nursing program that requires hearing for full participation, *see* Southeastern Community College v. Davis, *supra*, so too public television does not act unlawfully by presenting programs that require the capacity to hear for full enjoyment.

Second, the section does not require public television to undertake the affirmative actions and substantial expenditures that are necessarily entailed in making television accessible to the deaf. There are only limited means by which to convey visually the information that is normally included only on a television sound track. *See supra* pp. 4-5. The use of each requires both substantial expenditures (approximately $2500 per hour) and modification of existing practices and program content. *See* Appendix at 5a-6a. This Court indicated in *Davis* that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." 442 U.S. at 411 (footnote omitted); *see* University of Texas v. Camenisch, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring); American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1277-78 (D.C. Cir. 1981); Dopico v. Goldschmidt, 518 F. Supp. 1161, 1175-76 (S.D.N.Y. 1981); *cf.* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 23 (1981) ("When Congress intended to impose [affirmative-action] conditions on the grant of federal funds . . . it proved capable of doing so in clear terms.").

Third, the section must be construed carefully so as to avoid governmental intrusion into the protected editorial discretion of broadcasters. The modification of programming to meet the needs of the deaf can have substantial impact on program content. *See supra* pp. 4-5; Appendix at 6a. For example, captions conceal a portion of the television screen and can distract the viewer from the program's message and artistic value. They also impose technical constraints, *see supra* note 3, that affect programming. As a consequence, the application of Section 504 to programming raises substantial First Amendment issues. *See* Miami Herald Publishing Co. v.

discrimination [is not] always . . . clear." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 412 (1979). Drawing such a line is especially challenging where, as here, the relevant technology is in flux.[39]

In short, if the judgment of the Court of Appeals is allowed to stand, "congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly." *NAACP* v. *FPC*, 425 U.S. at 674 (Burger, C.J., concurring). In light of these facts, the course the Commission chose to take — reliance on guidance from the funding agencies charged with enforcing Section 504 — was clearly within its sound discretion. The Court of Appeals should not have forced the Commission to follow a different course.

Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 121-32 (1973).

Judicial or administrative determination that Section 504 does not requir special visually assisted programming for the deaf should not create concern that public television would not continue its strong record of voluntary efforts. Public television sought to improve access for the deaf before the Rehabilitation Act was even enacted. The factors other than Section 504 that have fostered its development are likely to continue.

[39] Many complicated questions would have to be answered in defining any obligations of public television toward the deaf. These include: (1) Do the obligations extend to all programming, or just to specific programming supported by federal financial assistance? (2) What methods of making programs accessible to the deaf should be required? (3) Should the requirements vary in accordance with the nature of the local viewing audience? (4) Should the requirements differentiate among types of programs (such as live programs, programs broadcast shortly after being recorded, programs recorded before a certain date)? (5) Should the requirements be different if the program is only for local use rather than for national use? (6) Should requirements vary depending on the size, location, mission or resources of particular stations?

B. The Court of Appeals Should Not Have Denied the Commission the Discretion to Establish General Requirements by Rulemaking or Other Prospective Means.

It was the Commission's view that "serious questions of fundamental fairness" would be raised if it were "to judge a licensee's qualifications on the basis of the retroactive application of . . . a requirement" to serve the deaf. KCET App. at 63a-64a. Judge McGowan echoed those concerns. KCET App. at 40a. Nonetheless, the Court of Appeals majority would compel the Commission now to consider the adequacy of KCET's programming for the deaf during the long past 1974-77 license term. The court took this action despite the absence of any television programming standards by any governmental agency during that period, and despite the Commission's express statements in 1970 and 1976 that it would impose no general requirements with regard to television programming for the deaf. The Court of Appeals thus forced the Commission to engage in retrospective examination of KCET's performance, foreclosing the Commission from even considering whether new obligations should be established only by general rulemaking or other means with prospective application.[40]

This Court has emphasized that "the choice . . . between proceeding by general rule or by individual, *ad hoc* litigation is

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[40] In addition, the Court of Appeals' action disrupts the Commission's policy to judge the license applications of commercial and non-commercial stations under a uniform public interest standard. *See* Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 291 (D.C. Cir. 1975) (noting that "with a few exceptions" non-commercial stations are subject to the same regulations as commercial stations), *cert. denied*, 425 U.S. 934 (1976); *cf.* Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1122-23 (D.C. Cir. 1978) (en banc). Not only does the Commission's policy reflect sound administrative practice, but also, as noted by Judge McGowan, "form is favored over substance when commercial stations are . . . spared the expense and uncertainty of renewal hearings, and a non-commercial station is not." KCET App. at 40a.

one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *see FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 808 n.29 (1978) ("[t]he Commission has substantial discretion as to whether to proceed by rulemaking or adjudication"). In order to avoid the unfairness that would result from the retroactive application of new standards of conduct, this Court has stated that "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through [the] quasi-legislative promulgation of rules to be applied in the future." *SEC* v. *Chenery Corp.*, *supra* at 202; *see Hale* v. *FCC*, 425 F.2d 556, 560 (D.C. Cir. 1970). [41]

The breadth of the Commission's discretion to change the scope of the public interest standard only prospectively is reflected in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). There, after weighing complex facts and competing policies, the Commission adopted regulations barring creation of new common ownerships of broadcast stations and daily newspapers in the same community, but required divestiture of existing newspaper-broadcast combinations in only sixteen "egregious cases." The Court of Appeals for the District of Columbia Circuit upheld the prospective application of the new rule, but held that the Commission should have extended the divestiture requirement to all existing combinations. *Id.* at 790-91. This Court, however, upheld the Commission's order in full. Although mindful of the strong First Amendment values that surrounded the issue, *id.* at 798-802, this Court held that "we are unwilling to presume that the

[41] In fact, it has been held that Section 504 does not impose affirmative duties unless and until implementing regulations are adopted. Carmi v. Metropolitan St. Louis Sewer Dist., 471 F. Supp. 119, 122 (E.D. Mo. 1979), *aff'd on other grounds*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980). In Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979), this Court recognized the important role of funding agency regulations in defining legal obligations under Section 504.

Commission acts unreasonably when it decides to try out a change in licensing policy primarily on a prospective basis." *Id.* at 811. It follows from *National Citizens Committee for Broadcasting* that if the Commission had decided in a rulemaking context, after a rational weighing of competing policies, not to apply new standards with regard to the deaf retroactively, the Court of Appeals would have erred in disturbing the Commission's action. The result should be no different when the issue arises, as here, in the adjudicatory context of an individual license application. The impropriety of the Court of Appeals' direction that the Commission should proceed to evaluate KCET's past performance is underscored by the Commission's repeated statements that it would undertake rulemaking when and if it determined that the time had come to impose requirements concerning non-emergency television visual aids for the deaf. KCET App. at 67a; *Deaf Viewers — Use of TV to Inform*, 26 F.C.C.2d 917, 918-19 (1970).

In addition to the unfairness that results from measuring long past conduct by newly formulated standards, the Court of Appeals' decision imposes an enormous burden on both the Commission and its public television licensees. The Court of Appeals directed the Commission "[to] assess the station's willingness — *as measured against its capacity and its viewers' need* — to provide programming for the aurally handicapped." KCET App. at 27a (emphasis added). The Commission would thus be required to undertake a complex case-by-case determination of the adequacy of each station's past programming for the deaf. The Court of Appeals apparently overlooked that such proceedings would be a severe and expensive drain on federal resources at a time when their careful conservation is a paramount national goal.

Moreover, public television stations — all of which also are confronted with declining funds[42] and must complete the license renewal process at least once in the next five years — would have to divert their scarce and dwindling resources from serving the public at large to defending the adequacy of their past service to the deaf.[43] Yet today, no public television station knows what level of service will pass muster in such a future proceeding. By the time a licensing proceeding is held, it would be too late for a station to go back and upgrade its service to the deaf and there is no assurance that a promise of future compliance would offset a finding of past deficiencies. KCET, of course, is placed in the most peril, for it apparently is to be the first station affected by the new approach mandated by the Court of Appeals and the first to face the threat of loss of license or other sanctions for a *post hoc* determination of a compliance shortfall.

The Court of Appeals acknowledged that "rulemaking might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing." KCET App. at 4a. Inexplicably, and contrary to the clear teachings of this Court, the Court of Appeals denied the Commission the flexibility to follow that course. It is

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[42] The Corporation for Public Broadcasting (CPB), a major source of funds for public television, faces the prospect of significant budget reductions. While the funding of CPB for Fiscal Year 1982 was $172 million, and authorized to be $220 million for 1983, the President has recently proposed actual appropriations of only $116.5 million for 1983, $93.5 million for 1984, and $85 million for 1985. *See* Public Broadcasting Report, Feb. 12, 1982, at 1.

[43] It has been estimated that a full license renewal hearing could easily entail legal costs for the applicant of several hundred thousand dollars. *See* Polsby, *FCC v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 Sup. Ct. Rev. 1, 19.

particularly ironic that the new directions commanded by the Court of Appeals should first threaten to impact adversely on KCET, the station which over the years has occupied the leading role in extending television to the deaf in its service area.

CONCLUSION

The Court of Appeals erred by intruding on the lawful discretion of the Commission to define the scope and content of the public interest standard of the Communications Act and to determine the procedures that would best implement it. As a result, the judgment of the Court of Appeals as to Community should be reversed with instructions that the Commission's orders denying Gottfried's petition against Community's 1977 license renewal application are to be affirmed.

Repectfully submitted,

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March 1982

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Appendix

APPENDIX

[SEAL] UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

ASSISTANT SECRETARY
FOR CIVIL RIGHTS
February 12, 1982

Dr. James L. Loper
President
KCET
4401 Sunset Boulevard
Los Angeles, California

Dear Dr. Loper:

The Office for Civil Rights (OCR) has completed its investigation of the complaint filed against public television station KCET. This complaint was filed on March 13, 1978 by Abraham Gottfried on behalf of deaf and hearing-impaired persons in the Los Angeles metropolitan area. The complainant alleges that the failure of KCET to caption its programming is a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended. We have concluded that in its capacity as a broadcaster KCET is in compliance with Section 504 with respect to assistance it receives from this Department.

JURISDICTION

The complaint was investigated under the authority of 34 C.F.R. § 104.61, *Procedures*, which incorporates the procedural provisions applicable to the Department's enforcement of Title VI of the Civil Rights Act of 1964. Those provisions are set out at 34 C.F.R. §§ 100.6-100.10, a copy of which is enclosed.

Section 504 of the Rehabilitation Act of 1973 provides that "[no] otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." The Department of Health, Education and Welfare (HEW), the predeces-

sor agency of this Department, issued regulations implementing that statute on May 4, 1977.[1] Following its establishment, the Department of Education reissued those regulations without substantive change at 34 C.F.R. Part 104.[2] The regulations apply to all recipients of financial assistance from this Department, and define and forbid acts of discrimination against qualified handicapped persons.

"Federal financial assistance" is defined at 34 C.F.R. § 104.3(h) to include:

> . . . any . . . arrangement by which the Department provides or otherwise makes available assistance in the form of . . .
>
> (3) . . . personal property or any interest in or use of such property, including:
>
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration . . .

KCET broadcasts television programs that are produced with funds provided by this Department.[3] We have been advised by your counsel in letters of September 17 and 18, 1981 that for the period July, August, and September 1981, KCET will have broadcast 423 hours of programming, or 19 percent of the station's total program hours, which were produced with funds provided by this Department. Those programs include The Electric Company, Sesame Street, Villa Allegre, and The New Americans. Although the figures represent the number of hours of programs broadcast in a particular quarter, a review of the 1980 study conducted by the Corporation for Public Broadcasting (CPB) has led us to conclude that these figures are representative of the extent to which programs produced with funds provided by this Department are utilized by individual public broadcasters in the course of a year.[4]

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[1] 42 Fed. Reg. 22676 (1977).

[2] 45 Fed. Reg. 30936 (1980).

[3] This includes programs produced with funds provided by the former Office of Education within HEW.

[4] Katzman, S., Katzman, N., *Public Television Programming Content by Category, Fiscal Year 1980,* Corporation for Public Broadcasting. (DRAFT).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Department has required and continues to require that programs produced with its funds for broadcast by public television stations and for which it has broadcast rights be made available to broadcasters at no cost, at reduced cost, or at less than fair market value.[5] These programs, and the rights in them, constitute "personal property or [an] interest in such property" and the receipt of those programs "for less than fair market value or for reduced consideration" is "Federal financial assistance" to the broadcaster within the meaning of the regulation quoted above. Thus, KCET, in broadcasting programs produced with funds provided by this Department, carries out a "program or activity receiving Federal financial assistance" within the meaning of Section 504. We do not believe, however, that the financial assistance provided by this Department to KCET, when it obtains Department-assisted programs at less than fair market value, constitutes Federal financial assistance to KCET's broadcast of other programs.

Section 104.4 of the *General Provisions* of the Section 504 regulations provides:

> (b) *Discriminatory actions prohibited.*
>
> (1) A recipient, in providing any aid, benefit, or service may not . . .
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

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[5] For many of these programs, this is required by statute. For example, the Emergency School Aid Act (ESAA), a significant source of funding for television programs, provided that:

> Television and radio programs developed in whole or in part with assistance provided under [the Act] shall be made reasonably available for transmission, free of charge, and shall not be transmitted under commercial sponsorship. 20 U.S.C. § 3201(a)(2) (1980).

For other programs, the Department has provided in its contracts that the programs be made available at no cost or at less than fair market value in order to encourage the widest possible distribution and the achievement of educational objectives on the largest scale possible.

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others.

In order to comply with these provisions, a recipient, in carrying out a program or activity receiving Federal financial assistance, may be required to modify the program or activity to accommodate the needs of handicapped individuals. As stated in the analysis to the Department's Section 504 regulations, these provisions:

> . . . acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs . . . may sometimes be necessary. 34 C.F.R. Part 104, Appendix A, Subpart A, paragraph 6.

Section 504 does not, however, require a recipient to carry out modifications that would alter the fundamental nature of the program or that would impose an undue financial or administrative burden on the recipient. See *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). As the Supreme Court said in that case: "The language and structure of the Rehabilitation Act of 1973 reflects a recognition by Congress of the distinction between the even-handed treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps . . . . [N]either the language, purpose nor history of Section 504 reveals the intent to impose an affirmative action obligation on all recipients of federal funds". The Court further stated, however, that technology plays an important role in providing new opportunities for handicapped people to participate in activities or otherwise to qualify them for programs from which their handicaps have excluded them. The Court added that where advances in technology would qualify a handicapped person, and the utilization of such technology would not create undue financial or administrative burdens on a recipient, a refusal to modify might be unreasonable and discriminatory. *Id.* at 405.

In a letter from your counsel of September 17, 1981, we were advised that in the period July 1 through September 30, 1981 KCET had scheduled broadcasts of 211 original hours of programs produced with funds provided by this Department. Of that total, 125.5 hours were to be broadcast in a form accessible to hearing-impaired people

through the use of closed or open captions. We calculate that if KCET had been required to close-caption the remaining 85.5 hours[6], the cost would have been $213,750 for the three month period under review.[7]

KCET's operating budget for the period under review, exclusive of funds allocated to develop specific programs, was between $2 and 2.25 million. Moreover, the average cost to a licensee of broadcasting a single hour of programing is approximately $460.[8] The cost of captioning and encoding that hour would be approximately $2500, more than five times as great.

On the basis of the foregoing, we conclude that the cost of captioning the 85.5 original hours of programs produced with funds provided by this Department would represent an undue financial burden on KCET within the meaning of *Davis*.[9]

We understand that KCET currently has the technical capability to transmit the encoded signal of any program that is closed-captioned when obtained by KCET. Moreover, we understand that KCET has been routinely transmitting the encoded signal for those programs which it receives in closed-captioned form. Since we do not regard KCET's continued transmission of the encoded signal as creating an undue financial or administrative burden, a continuation of that

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[6] It is our understanding that, at the time of broadcast by KCET, those programs were not available in captioned form.

[7] 85.5 hours x $2500 per hour cost of captioning. This calculation assumes that KCET would have the captioning and encoding done by an outside source, such as the National Captioning Institute, rather than undertaking to finance its own captioning capability.

[8] This figure was derived by dividing the total expenditures (broadcast and non-broadcast) of all licensees ($380,998,768), by the total broadcast hours of all licensees (830,671). *Summary Statistical Report of Public Television Licensees*, Corporation for Public Broadcasting (July 8, 1980).

[9] On the basis of the information available to us, we do not believe that KCET could reduce its costs by compelling the Public Broadcasting Service (PBS) to arrange for the captioning of the Department-assisted programs it distributes.

practice is required under Section 504 with respect to programs produced with funds from this Department.

Similarly, KCET is not required, when broadcasting programs produced with Department funds, to have the audio portion of the program translated into captions which are visible without the use of a decoding device. That method is referred to as "open captioning". We have concluded that requiring the use of this method would modify the fundamental nature of the program and would, therefore, be inconsistent with *Davis*, and that it could raise serious questions under the First Amendment. KCET may, nevertheless, continue to use the open format to meet other program objectives in accordance with the normal exercise of its editorial discretion.

To the extent that KCET broadcasts programs with closed captions, Section 504 does not require that KCET provide hearing-impaired persons with television sets or decoding devices.

Finally, we regard program selection and scheduling decisions as wholly within the prerogative of the station, and protected by the First Amendment.

For all these reasons, we conclude that KCET was under no obligation to modify the Department-assisted programs it broadcast during the period reviewed by adding its own closed captions or open captions. It should be noted that, since early 1979, this Department and its predecessor have generally required that videotape productions designed for broadcast by public television stations be closed-captioned. This policy, which the Department intends to continue, evolved from the voluntary cooperative effort between the public and private sectors to promote accessible television programing for hearing-impaired people. This Department has further undertaken to contract for the closed-captioning of all individual programs and series that were produced under awards made prior to early 1979, with the exception of the Electric Company. [10] By the end of the 1982

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[10] The Electric Company already contains many graphics and printed words, and consequently is now partially accessible to the hearing-impaired. Moreover, the Department's broadcast rights in that program are of short duration and will soon expire for the early shows in that series.

fiscal year, we expect the task to be accomplished. In addition, the Department plans to award a contract to retrieve uncaptioned copies of programs now in circulation for which captioned copies are available or will be available by the end of fiscal year 1982. As the Department secures the closed-captioning of previously uncaptioned programs and copies of programs and as new programs are produced with closed-captions, the number of Department-assisted programs available for broadcast without captions will decline dramatically.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence in response to inquiry.

If you have any questions concerning these matters, please contact Ned Stutman of my staff at (202) 245-0818.

Sincerely yours,

[signed]

Antonio J. Califa
Director for Litigation,
Enforcement and Policy Service

Respondent's Brief

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Nos. 81-298, 81-799

IN THE

Supreme Court of the United States

October Term, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, *et al.*,
Petitioners,

vs.

SUE GOTTFRIED, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS SUE GOTTFRIED AND THE GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.

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QUESTION PRESENTED.

Whether the Court of Appeals properly remanded the KCET license renewal application to the FCC to determine whether the station had engaged in unreasonable and discriminatory actions against deaf persons since:

A. The Commission has a statutory duty under the Communications Act to make an independent determination of whether KCET has met its burden to show that renewal is in the public interest;

B. KCET, as a recipient of federal financial assistance, and as a federal licensee, has a statutory and constitutional duty not to discriminate against deaf persons;

C. The Commission has a constitutional duty not to sanction discrimination;

D. The Court of Appeals had a duty to scrutinize the Commission's possible involvement in discrimination against the deaf minority and to correct improper or unreasonable action by the Commission not only for failure to act in consonance with pertinent federal legislation but also for failure to require its licensee to comply with statutory and constitutional commands.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-298

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,

Petitioner

vs.

SUE GOTTFRIED, *et al.*,

Respondents.

No. 81-799

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

vs.

SUE GOTTFRIED, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS SUE GOTTFRIED AND THE GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.

OPINIONS BELOW.

The opinion of the court of appeals is reported at 655 F.2d 297 and is reprinted in the Appendices of both Community Television of Southern California (KCET App., pp. 1a - 40a) and the Federal Communications Commission (FCC App., pp. 1a - 42a). The decisions of the Federal Communications Commission below are reported at 69 F.C.C.2d 451 and, on reconsideration, 72 F.C.C.2d 273. They appear at FCC App. 47a - 78a.

JURISDICTION.

The judgment of the court of appeals was entered on April 17, 1981, and rehearing denied on July 8, 1981 (FCC App. 43a - 46a). Petitions for writs of certiorari were filed by Community Television of Southern California (KCET) on August 14, 1981 and by the Federal Communications Commisison, after extension of time, on October 27, 1981. On January 11, 1982 the Court granted the petition in No. 81-799 (FCC) and granted it as to one question in No. 81-298 (KCET). This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS.

The relevant statutory provisions, 29 U.S.C. §794 and 47 U.S.C. §309 appear at KCET App. 73a - 78a.

COUNTERSTATEMENT OF THE CASE.

A. Introduction.

As a recipient of Federal financial assistance, television station KCET is subject to Section 504 of the Rehabilitation Act.[1] By this law, Congress intended to extend the benefits of federally subsidized programs to the handicapped.

This Congressional policy directly relates to the underlying purpose of the Communications Act to make broadcast services available to all the people, including local minor-

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[1]The Commission assumed applicability of Section 504 to public broadcasting stations. (FCC App. 60a, 65a, 71a.) HEW has found that it applied (J.A. 47, 57-59, 68-87), and the District Court has agreed, Greater Los Angeles Council on Deafness v. Community Television of Southern California, ____ F.Supp. ____ (C.D.Cal. 1981) (No. CV 78-4715-R), *appeal pending*, Greater Los Angeles Council on Deafness v. Bell, Ninth Cir. No. 81-5952 (hereinafter, "GLAD v. KCET") (District Court Findings of Fact and Conclusions of Law reprinted as Appendix to Reply Brief for Petitioners in No. 81-651, Sue Gottfried v. FCC, *cert. denied*, 102 S.Ct. 1004 (1982).)

ities, and that broadcast licensees provide the best practicable service to their local communities.

Under the Communications Act the Federal Communications Commission must make an independent public interest determination regarding every renewal application before it. 47 U.S.C. §309. The court of appeals reversed where the Commission failed to consider the Congressional policy of nondiscrimination against the deaf as part of its public interest determination on KCET's 1977 license renewal application.

Petitioners argue that the court has exceeded its proper judicial role — that the court is substituting its judgment for that of the expert administrative agency. Respondents, on the other hand, submit that the reviewing court had the responsibility to remand this case for failure to take into account a clearly relevant Congressional mandate, and for arbitrariness. The court, however, was extremely cautious in its opinion not to intrude into the agency's sphere of expertise and discretion. It therefore did not address the appropriate standard for broadcaster compliance with Section 504. Indeed, it specifically recognized that on remand the Commission could take into account the station's capacities and the viewers' needs in that respect.

Respondents submit that Federal appellate courts must be allowed to reverse and remand arbitrary agency actions which fail to consider Congressional mandates that closely relate to the regulatory purposes of the agency.

Perhaps because of the lack of supportive findings and sufficient rationale for the Commission's summary renewal grant, Petitioners have set forth a great amount of detail in their briefs on technical developments for televised captioning, irrelevant subsequent broadcasts by KCET and imagined FCC rationales for renewal. In order to place this

case in the proper perspective, then, Respondents must detail a more accurate account, setting forth the background to the Congressional policy of nondiscrimination codified in the Rehabilitation Act of 1973 and related legislation, the purposes of the Communications Act to which this Congressional mandate relates, prior FCC statements and actions leading up to the instant case, the FCC's actual decision and rationale under review, and finally, the sorrowful twelve-year governmental shell-game that leaves the deaf community in a Kafka-like state of limbo in trying to obtain access to television programming.

B. Background on Television and the Hearing Impaired.

Helen Keller, who suffered from the loss of both sight and hearing, stated:

> The problems of deafness are deeper and more complex, if not more important, than those of blindness. Deafness is a much worse misfortune for it means the loss of the most vital stimulus — the sound of the voice that brings language, sets thoughts astir and keeps us in the intellectual company of man.[2]

Although approximately one in ten Americans suffers from some loss of hearing, and one in a hundred has extreme diffficulty understanding speech,[3] this affliction is invisible

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[2]HELEN KELLER IN SCOTLAND, 68 (1933).

[3]Ear Research Institute, "A Discussion of the Cochlear Implant," Los Angeles, 1978. *See also* J. Schein & M. Delk, *The Deaf Population of the United States*, 16 (1974) (Table II.1) (13.4 million afflicted with hearing loss in 1974); Amendment to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, 63 F.C.C.2d 378, 379 (1976) (hereinafter, "*Captioning for the Deaf*"). Estimates for the Los Angeles area include over 500,000 (7.17%) with severe hearing impairments and over 65,000 (0.9%) totally deaf. See D.C.Cir. J.A. 26.

to the rest of us and usually ignored.[4] The deaf are experientially impoverished, misunderstood, often considered "dumb" or "retarded," and generally subject to societal prejudices. *Id.*

Although developments in communications technologies have potential to restore the deaf to a mainstream position, often the opposite is the case. As explained in the 1972 Deafness Annual[5]

> Seldom has progress in media development benefitted deaf people. The telephone has, ironically enough, put them at a great disadvantage, rather than "aiding the development of speech for the deaf," as Alexander Graham Bell intended. Motion pictures were different. They were ideal for deaf audiences — until they changed from silents to talkies. Radio, of course, was a communications disaster for deaf persons. Then came television.
>
> Television opened mass communication again to the deaf community. But television did not remain teleVISION very long. As it is presently used, it often is little more than "radio with a few pictures." There is heavy dependence on dialogue to forward the story. News broadcasts, in particular, are mostly read. Frequently the speaker cannot be seen or his face is too tiny an image to permit effective lipreading. As it has developed to now, television has not achieved its potential as a communications medium for deaf people.

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[4]For a thorough review of the plight of the deaf, *see* Note, *Television and the Hearing Impaired*, 34 FED. COMM. L.J. 93 (1982), and the Brief of *Amici Curiae* Deaf Counseling, Advocacy and Referral Agency et al., pp. 8-31.

[5]Deafness Annual, Prof. Rehab. Workers with Adult Deaf, Vol. II, pp. 71-72 (1972).

* * *

There are no theoretical or technical reasons for the exclusion of deaf persons from television as both an information and an entertainment source.

C. Congressional Response.

Congress responded to the long history of discrimination against the deaf and other handicapped persons. Section 504 is the first federal civil rights law protecting the rights of handicapped persons, including the hearing impaired, and reflects a national commitment to end discrimination on the basis of handicap. It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life.[6]

In December 1974, Congress enacted the White House Conference on Handicapped Individuals Act (hereinafter, "White House Conference Act"), 88 Stat. 1631, setting forth findings and policy concerning the Rehabilitation Act. *See* 29 U.S.C.A. §701, Historical Note. Congress there found that the benefits and fundamental rights of this society are often denied handicapped persons; that it is of critical importance to this nation that equality of opportunity, equal access to all aspects of society, and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps; that the Congressional goal, and final objective was to assure that all individuals with handicaps are able to live their lives independently, with dignity, and integrated into normal community living and working

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[6]HEW Section 504 Regulation (Supplementary Information), 42 Fed. Reg. 22676 (1977) ("There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. . . . Congress' mandate to end discrimination is clear.").

relationships; and that "*all levels of government must necessarily share responsibility for developing opportunities for individuals with handicaps.*" (Emphasis added.)

D. FCC Policies Relating to Television and the Deaf.

1. 1970 Public Notice.

Even before passage of the Rehabilitation Act in 1973, the FCC had recognized the special needs of the deaf for television. In its *Public Notice on Deaf Viewers — Use of TV to Inform*, 26 F.C.C.2d 917 (1970) (hereinafter, "Deaf Viewers"), the Commission alerted television licensees "to the importance of making television a truly valuable medium for the hard of hearing." *Id.*, 26 F.C.C.2d at 918. Although the Commission suggested captioning movies with subtitles and several stations "presenting material in a form especially useful to the deaf on a rotating basis . . .," *id.*, it ultimately left the *method* of service to the discretion of each individual licensee.

The Commission also recognized the relationship of service to the deaf and the agency's public interest mandate. It cautioned that it would "observe developments in this area in the near future, and if the situation does not develop satisfactorily it may be necessary to begin rulemaking looking toward adoption of minimum requirements." *Id.*, 26 F.C.C.2d at 918-19. Six years later, due to broadcaster inaction, the FCC had to require all broadcasters to provide visual emergency announcements. *Captioning of Emergency Messages on Television*, 61 F.C.C.2d 18 (1976), *reconsid.*, 62 F.C.C.2d 565 (1977).[7]

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[7]Subsequently the Commission also allowed use of Line 21 of the vertical blanking interval for "closed captioning" receivable by use of a special decoder. (See J.A. 12, n.1.) Captioning for the Deaf, *supra*, 63 F.C.C.2d 378 (1976). This technology is not at issue herein since it was not used by KCET during the relevant license period. Many stations, and the CBS Network, furthermore, refuse to caption their programming and the future viability of Line 21 for captioning for the deaf is in grave doubt. *See Washington Post*, February 17, 1982 at C12, cited in KCET Br. at n.9.

2. KCET's 1974-77 Performance.

Despite the FCC's expressed concern that licensees serve their local hearing impaired audiences, Los Angeles television station KCET showed a callous disregard for this silent minority during the bulk of the 1974-77 license term. In 1973, the Public Broadcasting Service, to which KCET belongs, began carriage of the captioned version of the "ABC Evening News with Harry Reasoner and Howard K. Smith." (J.A. 170.) As of January 31, 1977, there were 118 public television stations carrying this show, which was available free of charge. KCET, with one of the largest deaf populations in the country within its area of service, was conspicuously missing from that list. (J.A. 184.) This despite efforts by deaf representatives to have KCET air the program since 1975, and extensive efforts to intercede with ABC representatives to correct the station's misstatements regarding the network's permission to carry the rebroadcast.[8]

Similarly, although most public broadcasters aired a captioned version of "Scenes from a Marriage," from the PBS Network, KCET refused to carry that version, accessible to the deaf. Rather, it aired the version with an English language soundtrack "dubbed" into the Swedish movie. (D.C. Cir. J.A. 142.)

After picketing at the station by the deaf, and in the last five months of its license term, the station reluctantly began airing the ABC News at 11:30 p.m., a time it had previously

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[8]Excerpts from correspondence among KCET, Gottfried and ABC are reprinted in the Joint Appendix in the court of appeals below (D.C.Cir. J.A. 75-93). They include a letter from the local ABC vice president (now president of ABC Television) siding with Mr. Gottfried regarding the accuracy of his statements, occasioning KCET's president later to retract his on-air accusation that Mr. Gottfried lied about this matter.

represented was "ineffective," and at 6:30 a.m. the following morning, both on a six month trial basis. Other programs aired during the license term were predominantly (over 95%)[9] inaccessible to the deaf.

Believing that the station had exemplified a discriminatory attitude, and that it was not complying with the requirements of Section 504 of the Rehabilitation Act, the public interest standard of the Communications Act, or the first amendment and due process (equal protection) interests of the deaf segment of the public, Mrs. Gottfried and the Greater Los Angeles Council on Deafness, Inc. (GLAD) unsuccessfully sought to reconcile their differences with the station. As a last resort they petitioned the FCC for a hearing on the question.[10]

3. The FCC's Summary Grant of KCET's Renewal Application.

After going out of its way to deny GLAD standing (FCC App. 47a - 51a, 66a, 75a - 76a; but see 12a, n.32), the Commission dismissed Gottfried's petition in all respects without holding a hearing, conducting a separate investigation, or conditioning the renewal grant on any subsequent action relating to the issue of service to the deaf. It found no problem with an ascertainment survey of the general public conducted predominantly by telephone, regardless of the deaf's inability to be included therein. (FCC App. 55a.) Furthermore, the Commission held that since it had not adopted specific rules relating to program service to the

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[9]KCET claimed to have broadcast 960 programs of unspecified length accessible to the deaf. Many of these were repeats and aired at odd hours of the night or morning. But even that figure would amount to less than 5% of the total aired during a three year period. The Commission made no findings on this point, however, nor did it conduct further inquiries to ascertain facts regarding accessibility.

[10]Gottfried and GLAD also petitioned against other TV stations in Los Angeles. These cases are not before the Court in this matter.

deaf, a licensee's shortcomings in that respect could not form a basis for renewal sanctions or further inquiry. (FCC App. 58a - 59a.)

Assuming that KCET was subject to Section 504 of the Rehabilitation Act, the Commission nevertheless would not inquire any further to determine whether the station in fact complied with the Congressional dictates contained therein. Rather, the Commission held that it would only give consideration to an adverse finding by the Department of Health, Education and Welfare that the law had been violated.[11] However, it did not condition the license renewal grant on the outcome of a pending complaint against KCET before HEW.[12] The Commission also denied reconsideration of its action. (FCC App. 63a.)

E. The Court of Appeals Decision Below.

The court of appeals, finding that public station KCET is a recipient of federal financial assistance, reversed the Commission's summary rejection of Respondent's petition to deny. It held that the agency erred by failing to take the Congressional anti-discrimination policy into account as part of its public interest determination on individual license

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[11]HEW, later the Department of Education (ED), was not concerned with whether KCET complied with its obligations under §504 generally, but was only concerned with whether funds provided by the department were used in accordance with its understanding of §504 requirements. Respondent was not permitted to participate as a party in the administrative action. The conclusion eventually reached by the Department in 1982 concerning KCET is in conflict with *GLAD v. KCET*, *supra*. Furthermore, it is based on 1981 facts — broadcasts occurring well after the license term in issue.

[12]The Commission normally conditions renewals on the outcome of pending litigation that might relate to the licensee's qualifications for renewal. *See e.g.*, conditions placed on NBC at FCC App. 62a, referring to National Broadcasting Co., 56 F.C.C.2d 411, 420-21 (1976) (includes reference to discrimination complaints pending against the licensee).

renewal applications. The Commission erred, the court found, by failing "to inquire at least into the station's good faith, as manifest in its efforts to provide service in accord with the legislative policy goals of Section 504." (FCC App. 27a.) The court suggested that the FCC "assess the station's willingness — as measured against its capacity and its viewers' need — to provide programming for the aurally handicapped." *Id.* It specifically refused to suggest any standard of compliance, deferring instead to the Commission's special expertise concerning what can reasonably be expected of a public broadcaster "within the context of current technology and current needs." (FCC App. 29a.)

The Court denied rehearing or en banc review. (FCC App. 43a.)

F. Other Proceedings.

Since 1970 the deaf have been promised service from our public trustees, the nation's few governmentally chosen and protected broadcast licensees. Since 1973, Congress has mandated inclusion of the deaf and other people with disabilities in programs delivered by recipients of federal financial assistance. Yet to this date, the federal government has shamefully avoided application of this law to the medium of television supported by federal subsidies. It is playing an administrative shell game. The prospect of governmental action is shuffled among several agencies, and between rulemaking and adjudicatory contexts. But whenever the deaf point to a shell, the pea is hidden under a different one — if under any at all.

When deaf representatives requested rulemaking in 1970 to make programming accessible to the deaf, the Commission declined in favor of a Public Notice informing each

licensee of its responsibility in this respect.[13] Importantly, the Commission there stated that this would be an individualized responsibility. *Deaf Viewers, supra*, 26 F.C.C.2d at 918. Beyond this, the Commission also promised to review the question of rulemaking if the Public Notice proved unsatisfactory generally in achieving the stated goal of localized service to the deaf.

Six years later, the Commission acted again in this area. In response to petitions filed by four groups representing deaf audiences, the Commission required broadcasters to provide visual transmission of emergency messages,[14] and allowed them to broadcast "closed captions" over Line 21 of the vertical blanking interval. *Captioning for the Deaf*, 63 F.C.C.2d 378 (1976).

In the latter decision, the Commission explained that no particular method of service, such as closed captioning, was specifically required. Rather, it stated that "licensees can and will be responsive to the needs of its viewers, but it is still the responsibility of each licensee to determine how it can most effectively meet those needs." *Id.*, 63 F.C.C.2d at 389.

In Los Angeles, the deaf strongly demonstrated their need for accessibility to television.[15] Yet when they pressed their complaints of non-accessibility before the FCC, the Commission refused to consider such specifics because it had not adopted a rule requiring a certain amount of accessible programming. It also chose to await action by other agencies

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[13]Nancy Lipschultz (Illinois Ass'n for the Deaf Chicago TV Committee), 26 F.C.C.2d 916 (1970); *Deaf Viewers, supra*.

[14]Emergency Messages — Television, 61 F.C.C.2d 18 (1976), *reconsideration granted in part*, 62 F.C.C.2d 565 (1977).

[15]See, *e.g.*, Joint Appendix in the court of appeals (D.C.Cir. J.A. 23-99, 138-46, 164-73, 179-83). See also J.A. 121, 139-42, 145-46, 159-61 herein.

rather than to act itself, even though the Commission was aware that the Department of Health, Education and Welfare was not planning to act on the matter "pending the enactment of legislation by Congress to determine which agency has the responsibility to enforce compliance with the Rehabilitation Act." (FCC App. 71a.)

Ironically, when the deaf have chosen other forums to pursue the issue, they are similarly shuttled around the federal bureaucracy. In fact, in a class action suit which Respondent GLAD filed against KCET, HEW, FCC, and other entities in the chain of governmental funding of public television, KCET argued that the District Court could not entertain the suit on Section 504 grounds because the FCC had primary jurisdiction over the claim. (J.A. 148-50.) Yet before the Commission KCET argued (D.C.Cir. J.A. 113), and the Commission dutifully ruled, that the Commission was not the appropriate forum for determination of Rehabilitation Act complaints. (FCC App. 60a, 71a.) It would await a determination from the "expert" agency, the Commission stated, in this case the Department of Health, Education and Welfare, which was holding the matter in abeyance indefinitely. *Id.*

Subsequently, HEW's role was reassigned to the Department of Education (ED), after the formation of the latter as a department. (J.A. 15, 26-27.) This Department finally, after court order, instituted a rulemaking on the subject, delayed it considerably, and after two years, decided not to issue a rule after all, but instead to answer complaints on an ad hoc basis.[16] The FCC now states that it is waiting

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[16]Recently ED issued a letter regarding KCET's more recent (1981) programming which was supplied from ED funds. As we explain *infra*, p. 37, this ruling does not pertain to the facts in issue in this case.

for the Department of Justice to issue a regulation applicable to public broadcasting, notwithstanding the fact that Justice plainly has no expertise in the field of broadcasting and Justice does not grant federal financial assistance to public broadcasters.[17]

Furthermore, despite the Commission's arguments in this Court regarding deference to other agencies, and that the matter would be more appropriately handled by rulemaking, the Commission has consistently refused even to institute a rulemaking on the subject,[18] and is not obligated to follow the decision of another agency in determining the public interest merits of an application before it.[19]

KCET eloquently stated the reasons why the FCC is the "particularly appropriate" agency to consider Section 504 type allegations against broadcasters. (J.A. 149.) Nine years after passage of the Rehabilitation Act, however, the shell game continues, so that the Commission has yet to address specific complaints that the level of local service to the deaf is inadequate to meet basic public interest standards. Nor will it determine generally the appropriate standard. Continually rebuffed in the rulemaking context, the deaf

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[17]In GLAD v. KCET, *supra*, the court stated: "The responsible government agencies, including the Federal Communications Commission, the Department of Justice, and the Department of Education have delayed unreasonably in issuing regulations implementing Section 504 as that statute applies to public broadcasting. This delay is exacerbated by the government's shifts in rulemaking responsibility applicable to public television, seemingly to avoid determination of compliance guidelines for programming for the deaf. This action by the government is tantamount to intentional discrimination against the deaf." (Conclusion of Law, 9.) *See also* J.A. 18-41.

[18]Nancy Lipschultz, 26 F.C.C.2d 916 (1970); Broadcast EEO Rules and Form 395, 76 F.C.C.2d 86, *reconsideration denied* 80 F.C.C.2d 299 (1980), *appeal pending sub nom.*, California Ass'n of the Physically Handicapped v. FCC, Ninth Cir. Nos. 80-7157, 80-7482.

[19]*See, e.g.*, National Organization for Women, New York City v. FCC, 555 F.2d 1002, 1017-18 (D.C.Cir. 1977) (hereinafter NOW v. FCC).

representatives have chosen to exercise their rights to pursue the matter in a license renewal context. The court of appeals simply ordered the Commission to consider this clearly relevant issue in the licensing context which was before it.

SUMMARY OF ARGUMENT.

1. A central issue in this case is whether the Federal Communications Commission acted arbitrarily, and contrary to law when it summarily dismissed, without holding a hearing, respondents' petition to deny license renewal on the ground, *inter alia*, that public station KCET had engaged in unreasonable and discriminatory conduct against the nation's deaf minority, during its 1974-1977 license term. The Commission stated that since it had imposed no requirement that any television station — commercial or public — provide captioning or any other form of special visual material for the deaf, it would take no action against KCET for its failure "to do something that we have not required them to do." (FCC App. 75a). The Commission saw "nothing inconsistent in concluding that licensees are serving the public interest, although they are not [providing service for the deaf] in view of the fact that we have not required licensees to undertake such an activity." (FCC App.73a). The Court of Appeals correctly remanded the case to the Commission for consideration of the congressional mandate of nondiscrimination against the deaf.

It cannot be denied that there is a national policy requiring all levels of government to share responsibility for developing opportunities for individuals with handicaps to live full and independent lives. In 1973, Congress enacted Section 504 of the Rehabilitation Act, a civil rights statute which prohibits discrimination against handicapped persons by recipients of federal financial assistance, and which for-

bids recipients from excluding handicapped persons from the participation in, or the benefits of, any program or activity conducted by such recipients. The congressional findings and policy are clear. Congress found that the benefits and fundamental rights of this society are often denied individuals with handicaps; that it is of critical importance to this nation that equality of opportunity, equal access to all aspects of society, and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps; that it is essential that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working, and service patterns be held as the final objective; and that "all levels of government must necessarily share responsibility for developing opportunities for individuals with handicaps." White House Conference Act, *supra*, at §301(7), *reprinted* at 29 U.S.C.A. §701, Historical Note. Congress called for special recommendations for "enabling individuals with handicaps to have access to usable communications services and devices at costs comparable to other members of the population." *Id.* at Sec. 302(d)(4). The court of appeals correctly concluded that the FCC's "public interest" mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations on public broadcasters under Section 504. The court noted that the Commission itself has recognized its obligation under the public interest standard to protect the interests of minority groups previously excluded from full access to broadcast programming, and concluded that it is unreasonable to believe that a public station could give service recognizable as being "in the public interest" without at least making efforts to satisfy its statutory obligations.

2. The Court also correctly held that the Commission could not avoid its obligation to determine whether its licensee is discriminating against disabled persons by asserting that other agencies may have a primary responsibility for enforcing Section 504. This Court has made clear that the grant of enforcement power to one organ of government does not free others to ignore national laws and policies until such time as violations have been proved in the courts. *See, e.g., McLean Trucking Co. v. United States*, 321 U.S. 67, 78-80 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-224 (1943). As the Commission itself has stated, "the importance and urgency of equal employment opportunity policy in the other areas covered command its implementation on every appropriate front. . . . [W]e have an independent responsibility to effectuate such a strong national policy in broadcasting, and . . . we need not await a judgment of discrimination by some other forum or tribunal." *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240-41 (1969). Where, as here, the policy of Section 504 falls well within the broad purposes of the Communications Act, the "public interest" standard established by the Communications Act imposes on the FCC an affirmative obligation to insure that its licensees' programming fairly reflects the tastes of minority groups. *N.A.A.C.P v. FPC*, 425 U.S. 662 at 670, n.7. Moreover, at the time the Commission dismissed Respondents' petition the various federal agencies involved had not decided which agency should have Section 504 responsibility over public broadcasters. Indeed, as of this date, no agency has yet promulgated a regulation applicable to public broadcasting, although the Department of Justice, which does not grant federal financial assistance, is in the process of writing such a regulation.

3. The Commission plainly provides "tangible aid" to KCET by granting it the free and exclusive use of a limited and valuable part of the public domain. As the Commission early recognized, "A substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal . . . opportunity." *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240-41 (1969). Yet the Commission has imposed *no* obligation on the station to refrain from discriminating against disabled persons. By its action and inaction, the Commission has thus encouraged and fostered discrimination against deaf people by KCET. *Norwood v. Harrison*, 413 U.S. 455 (1973).

4. Contrary to petitioners' suggestions, the court of appeals did not intrude on the Commission's area of expertise. Its suggested "no *a priori* preference" among a "variety of dispositional alternatives." (FCC App. 28a). It specifically conceded a great latitude on the Commission's part to "assess the station's willingness — as measured against its capacity and its viewers' need — to provide programming for the aurally handicapped." (FCC App. 27a). Thus, this case does not involve the substantive specifics of the appropriate level of service KCET must provide hearing impaired persons. The point of this case, solely, is that the Commission cannot totally ignore the rights of deaf persons when a public station, concededly receiving federal financial assistance, is challenged on the ground that it has engaged in unreasonable and discriminatory actions in violation of Section 504.

5. Under the Administrative Procedure Act the Court of Appeals is charged with reviewing, and required to decide, all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action. "The Federal courts have power to correct improper or inadequate action of federal officials not only . . . for failure to observe constitutional limits, but also for failure to act in consonance with pertinent federal legislation. . . . The remedial authority of the courts does not put the judges in the shoes of the officials involved. 'Judicial authority enters only when local authority defaults.' " [Citations omitted]. *Green v. Connolly*, 330 F. Supp. 1150, 1172 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). In the case at bar, the Court of Appeals did not put itself "in the shoes" of the Commission. Instead, it remanded the case to the Commission to correct improper and unreasonable action.

ARGUMENT.

I.

THE COURT OF APPEALS CORRECTLY REMANDED THE FEDERAL COMMUNICATIONS COMMISSION'S SUMMARY GRANT OF KCET'S 1977 LICENSE RENEWAL APPLICATION FOR CONSIDERATION OF THE CONGRESSIONAL AND CONSTITUTIONAL MANDATE OF NONDISCRIMINATION AGAINST THE DEAF.

A. An Administrative Agency Must Consider All Relevant Factors in Reaching an Adjudicatory Decision.

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1972), this Court held that as a tenet of administrative law, agencies must consider all relevant factors when making a final decision. This Court has long held that a Federal administrative agency incorporates in its "public interest" standard those Congressional policies which relate to the underlying purposes of the agency's organizational legislation. *NAACP v. FPC*, 425 U.S. 662, 669 (1976); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80, 86 (1944). (See also cases cited at FCC App. 20a.)

Furthermore, the Federal Communications Commission is held to the standard that it not be arbitrary in deciding whether or not to hold a hearing or to impose some other authorized sanction in its individualized review of valuable broadcast license applications. This includes a requirement of reasonableness in both procedural approaches (*Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 357 (D.C.Cir. 1949) [Commission cannot ignore a material difference between two competing applicants]), and substantive determinations (*Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C.Cir. 1966) (hereinafter, "*United Church of Christ — I*") [hearing required on prima facie evidence of discriminatory programming).

While it is clear that an agency merits judicial deference in its area of expertise,[20] the courts must remain vigilant to see that Congressional mandates are not ignored. *See, e.g., Green v. Connolly*, 330 F.Supp. 1150, 1172 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). Thus, although the FCC has been given very broad discretion to interpret the public interest standard of the Communications Act, it still has to consider certain national policies which have been clearly enunciated by Congress. The reviewing court's duty then, "is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast halls of the federal bureaucracy." *Calvert Cliffs' Coord. Committee v. United States AEC*, 449 F.2d 1109, 1111 (D.C.Cir. 1971). This is particularly important when the legislature has prescribed an unequivocal course of action for the nation to follow, and the policy relates to the purpose of the regulatory body. *See, e.g., NAACP v. FPC, supra; McLean Trucking Co. v. United States, supra*, 321 U.S. at 79-86.

In this case, the Congressional policy of barring discrimination against the deaf by recipients of Federal financial assistance was ignored by the FCC in the license renewal context. As we demonstrate below, nondiscrimination against a specified segment of the population relates directly

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[20]This Court has certainly made it clear that the expert decisions of the Federal Communications Commission warrant the utmost judicial deference. *E.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978); National Broadcasting Co. v. United States, 319 U.S. 190 (1943). The court of appeals below recognized this point by repeatedly refusing to reach such questions as the appropriate standard for compliance with Section 504 by public broadcasters. Rather, the court specifically deferred to the Commission on such matters.

to the purposes of the Communications Act, and the Constitution. Thus, the matter was properly remanded to the FCC.

B. The Congressional Policy Providing That No Otherwise Qualified Handicapped Person Shall Be Denied the Benefits of Activities Receiving Federal Financial Assistance Is Clearly Related to the Regulatory Purposes of the Communications Act.

1. Purposes of the Communications Act.

For many regulatory agencies, the organizational purposes relate primarily to economics. In the transportation agencies, for example, regulation was deemed necessary to assure efficient economic operations and maximum service at reasonable rates to consumers.

The regulation of broadcasting, however, is different. *United States v. Radio Corp. of America*, 358 U.S. 334, 348 (1959). Limitations on entry in this business necessarily infringe upon many individuals' rights to disseminate their ideas over the most effective and pervasive medium of communications in our country, the broadcast frequencies. *See Red Lion Broadcasting Corp. v. FCC*, 395 U.S. 367 (1969).

This Court has consistently concluded that certain non-economic limitations are necessary in the use of broadcast frequencies to enable the public to receive the maximum amount of intelligible signals over their local radio and television receivers. *Id.*; *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). A few licensees are chosen by the Government as trustees for the public, and these trustees are held broadly accountable under the public interest standard for their stewardships. *Id. See also, CBS v. FCC*, 453 U.S. ____, ____, 101 S.Ct. 2813, 2829 (1981); *CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 101, 120, 125, 130-31 (1973).

In licensing according to the public interest, the Federal Communications Commission has been guided over the years by Congress' regulatory purposes for creating the Commission. These purposes can be found, *inter alia*, in Sections 1,[21] 303(g)[22] and 307(b)[23] of the Communications Act, 47 U.S.C. §§151, 303(g) and 307(b). *See, e.g., United States v. Midwest Video Corp.*, 406 U.S. 649, 667-70 (1972).

In a comprehensive review of its licensing policies in 1965, the Commission described its purposes in awarding broadcast licenses as to encourage diversification of information sources and to provide the best practicable service to local communities. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The Commission has also consistently acknowledged the regulatory goal of having broadcasters program in response to local needs and problems.[24]

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[21]"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, *to all the people of the United States* a rapid, efficient, Nationwide and world-wide wire and radio communication service . . ." 47 U.S.C. §151 (emphasis added).

[22]The Commission shall ". . . generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. §303(g).

[23]"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

[24]*See, e.g.*, Deregulation of Radio, 84 F.C.C.2d 968, 978, *reconsideration denied* 87 F.C.C.2d 797 (1981), *appeal pending sub nom.*, Office of Communications of the United Church of Christ v. FCC, D.C.Cir. No. 81-1032 (responsiveness to local needs retained while other requirements for radio deregulated); Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 F.C.C. 2303, 2311, 2314 (1960). See also Henry v. FCC, 302 F.2d 191 (D.C.Cir. 1962) (license denied for failure to address needs of local community to be served).

A crucial consideration under the Communications Act's public interest standard, then, is a licensee's fair programming service to local minority groups. *NAACP v. FPC*, 425 U.S. 662, 670, n.7 (1975); *United Church of Christ — I, supra*, 359 F.2d at 1007. The Commission and the courts have also recognized this obligation under the public interest standard to consider and protect the interests of minorities, women and other significant groups previously excluded from full access to broadcast programming.[25]

It is thus apparent that the traditional administrative and judicial interpretations of the Communications Act mandate licensee service to local audiences including minorities. A licensee's failure to do so necessitates inquiry,[26] if not negative sanction by the FCC.[27]

2. Service to Local Minorities Necessarily Includes the Disabled and the Deaf.

After the court's landmark decision in *United Church of Christ — I, supra*, the FCC acted in several ways to assure service to local minority groups within a broadcaster's ser-

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[25]See, e.g. NAACP v. FPC, *supra*, 425 U.S. at 670, n.7; National Organization for Women, NYC Chapter v. FCC, 555 F.2d 1002, 1017 (D.C.Cir. 1977) (hereinafter, NOW v. FCC); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C. 2d 226 (1976), *rev'd on other grounds sub nom.* Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977); Nondiscrimination in the Employment Practices of Licensees, 13 F.C.C.2d 766 (1968).

[26]*See, e.g.*, Bilingual Bicultural Coalition v. FCC, 595 F.2d 621, 629-30, n.36 (D.C.Cir. 1978) (en banc); Los Angeles Women's Coalition v. FCC, 584 F.2d 1089 (D.C.Cir. 1978); NOW v. FCC, *supra*, 555 F.2d at 1018 and n.103.

[27]Alabama Educational Television Commission, 50 F.C.C.2d 461 (1975) (denial of licenses for failure to serve local Black communities); Employment Policies and Practices-Florida, 44 F.C.C.2d 735, 740 (1974) (renewals conditioned on future reporting requirements regarding employment of minorities and women).

vice area. It required specific ascertainment of local community needs and problems,[28] sought to encourage minority ownership of broadcast stations,[29] and adopted rules and policies relating to equal employment opportunities for minorities and women. It is the area of EEO rules that the Commission most clearly recognized the direct relevancy of the national policies against discrimination to the Commission's obligations under the public interest standard of the Communications Act. *See NAACP v. FPC, supra,* 425 U.S. at 670, n.7.

In adopting its Equal Employment Opportunity Rules in 1968, the Commission relied on Congress' expression of national policy to protect racial and ethnic groups against discrimination. The Commission's Order adopting its first broadcast EEO rules stated, first and foremost, that "There is a national policy against discrimination in employment on the basis of race, religion, sex or nationality." *Nondiscrimination Employment Practices of Broadcast Licensees,* 13 F.C.C.2d 766, 767 (1968). It went on to point out that "This is particularly embodied in Section VII of the Civil Rights Act of 1964 . . . " *Id.* But, this section was not the exclusive basis, nor meant to limit the reach of the Commission's rules. Rather, the Commission pointed to the antidiscrimination laws of 30 states, *id.*, 13 F.C.C.2d at p. 768, and Executive Order 11246 (dealing with Federal contractors), *id.* at nn. 3-4, as further bases for determining the national policy against discrimination.

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[28]*See, e.g.*, Bamford v. FCC, 535 F.2d 78, 79-80 (D.C.Cir. 1976) (license denied for failure to ascertain leaders representing the poor). *See also* Henry v. FCC, *supra* n.24.

[29]Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978). *See also* TV9 v. FCC, 495 F.2d 929, 936-38 (D.C.Cir. 1973), *cert. denied* 418 U.S. 986 (1974).

Furthermore, the Commission applied its rules to many licensees, regardless of whether or not they were subject to specific prohibitions in Federal or State antidiscrimination laws. *Id.*, 13 F.C.C.2d at p. 772. It did so under its mandate to regulate broadcasters under the public interest standard of the Communications Act, the national policy, and the nature of the broadcast media. And the Commission, finally, observed that "a mass media service to the public which is based entirely on a Federal license under a public interest standard . . . clearly parallels the Federal policy in contract awards." (*Id.*, 13 F.C.C.2d at p. 769. See also Letter from Department of Justice attached, 13 F.C.C.2d at 775-77.) Federal contract awards are covered in Title VI, Section 602 of the Civil Rights Act, 42 U.S.C. §2000d-1.

Thus while the Commission did not specifically mention "Federal financial assistance," it being unnecessary in view of the broad authority involved, the agency did refer to one of the triggers for coverage under Title VI of the Civil Rights Act of 1964, federal contractors. And the Department of Justice, charged with primary enforcement of the Act, found broad FCC authority to act beyond Title VII and urged such action.[30]

Similarly, when the Commission extended its EEO rules to include women, it relied on the national policy against discrimination and incorporated that policy into the Communications Act:

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[30]*See also* FCC & EEOC — Memorandum of Understanding, 70 F.C.C.2d 2320, 2322-25 (1978), *appeal dismissed sub nom.* Nat'l Ass'n of Broadcasters v. FCC, 46 P&F Radio Reg.2d 1175 (D.C.Cir. 1979), and authorities cited by the Commission therein. The Commission cites to this Memorandum in its brief at n.39 for the proposition that it may condition any action on the outcome of a court proceeding. Significantly, however, the Commission did not condition the grant of KCET's renewal here under review on the result of other cases.

> The issue has been raised . . . and the national policy is clear. Employment discrimination because of sex would violate the Civil Rights Act and would accordingly be proscribed by the public interest requirements of the Communications Act.[31]

Reference was made to Title VII of the Civil Rights Laws, 42 U.S.C. §2000e, because the Commission was dealing with the issue of employment, and it was most natural to relate the Commission's EEO rules directly to Title VII. The fact that the Commission went beyond that reference, however, indicates that the real rationale for the Commission's action was to bring the national policy of anti-discrimination into the broadcasting realm under the public interest standard.

While EEO rules are a broadcast analog to Title VII, they are ultimately justified only in relation to the Commission's obligations with respect to assuring broadcast *programming* for all the people. *NAACP v. FPC, supra*. This programming obligation was clear at least since the *United Church of Christ — I* decision in 1966 or even prior FCC programming policy statements,[32] and is independent of any Civil Rights Laws. Nevertheless, the adoption of specific Congressional mandates and policies gives greater urgency to their consideration as one aspect of the overall public interest.

It is undisputed that Congress modeled Section 504 of the Rehabilitation Act[33] after Title VI of the Civil Rights

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[31]Nondiscrimination Employment Practices of Broadcast Licensees, 23 F.C.C.2d 430, 431 (1970).

[32]*E.g.*, Report and Statement of Policy Re: Commission En Banc Programming Inquiry, *supra*, 44 F.C.C. at 2314.

[33]87 Stat. 357, 29 U.S.C. §794.

Laws[34] and Title IX of the Education Amendments of 1972.[35] FCC Br. at 21-22. This was intended to establish "a broad government policy that programs receiving financial assistance shall be operated without discrimination on the basis of handicap." S. Rep. 93-1297, 93rd Cong., 2d Sess. 39 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 6373, 6390 (1974 Amendments). See also Statement of Sen. Dole, 119 Cong. Rec. 24589 (July 18, 1973) (upon adoption of the 1973 legislation). In adopting the Rehabilitation Act, and its 1974 and 1978 amendments, Congress intended to afford the handicapped the same, if not greater[36] nondis-

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[34]78 Stat. 252, 42 U.S.C. §2000d.

[35]86 Stat. 374, 20 U.S.C. §1683.

[36]At the time the Secretary of HEW issued the Section 504 regulation he issued a release reading in part as follows: "For decades, handicapped Americans have been an oppressed and, all too often, a hidden minority, subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens. Today I am issuing a regulation, pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans — the blind, the deaf, persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps. The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficience and decent treatment will begin to fall before the force of law. The 504 Regulation will work fundamental changes in many facets of American life. In many cases this regulation calls for dramatic changes in the action and attitudes of institutions and individuals who are recipients of HEW funds. In implementing the unequivocal Congressional statute, this regulation opens a new era of civil rights in America. . . . All recipients of HEW funds must complete within one year a self-evaluation process, in consultation with handicapped individuals and organizations, to determine which of their policies and practices need to be changed to assure equal opportunity for handicapped Americans. . . . This regulation not only bars recipients of HEW funds from unfairly excluding handicapped individuals, but it also requires positive steps to give handicapped citizens meaningful equality of opportunity in employment and in health.

criminatory treatment as it legislated under Titles VI and IX for minorities and women. Congress, at the same time, wanted all levels of government to work to enable individuals with handicaps "to have access to usable communications services and devices at costs comparable to other members of the population." White House Conference Act, *supra*, §302(d)(4) *reprinted at* 29 U.S.C.A. §701, Historical Note.

At the time of passage of the Rehabilitation Act, the national policies of nondiscrimination against minorities and women were incorporated by the FCC into its licensing policies under the Communications Act. (See *supra*, pp. 25-27.) Certainly the adoption of this law to aid the disabled, including the deaf and hearing impaired, could only be understood to have supported or enhanced the interests of the disabled with respect to broadcasters receiving federal assistance. *Cf. Merrill Lynch Pierce Fenner & Smith v. Curran*. 50 U.S.L.W. 4457, 4465, n.66 (U.S. May 4, 1982). Indeed, at the time of adoption of the Rehabilitation Act, the FCC itself had issued a public notice to all television stations informing them of their obligation to serve the deaf, albeit the *method* of service was left to their discretion. *Deaf Viewers, supra*, 26 F.C.C.2d at 918.

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education and social service programs. Discriminatory practices directed toward handicapped persons — just like those directed at racial minorities and women — are often deeply ingrained. We must recognize that positive steps will, in some instances, be required so that handicapped individuals are able to learn, to work, and to compete on a fair and equal basis. Admitting a deaf child to class, for example, is a meaningless gesture unless an interpreter is also available to communicate the teacher's words. . . . The 504 Regulation today becomes the law of the land, and it is critically important that we obey that law and make these new rules a reality for handicapped Americans. . . . . Section 504 and this regulation constitute a striking recognition of the civil rights of America's handicapped citizens, just as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, and their companion regulations, are critical elements in the structure of law protecting the civil rights of racial minorities and women. In Section 504, the Congress enacted a charter of equality to help end the shameful national neglect of handicapped individuals and to translate many of their legitimate needs into legal rights."

Congress' clear intent for the handicapped to be brought into mainstream America necessarily includes access to our national communications system, where television sets are more pervasive than indoor toilets (over 97% of households).[37] The importance of television to our daily lives as citizens, and its pervasiveness have been recognized by this Court and many commentators.[38]

The passage of the Rehabilitation Act of 1973 mandated an urgency to include the handicapped generally, and in this case to consider the effect of television broadcasters' actions with respect to the deaf or hearing impaired. This policy should apply to all broadcasters, who are analogous to federal contractors,[39] if not technically recipients of federal financial assistance.[40] At the least it must apply to public

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[37]*See supra*, n.36. *See generally*, Note, Television and the Hearing Impaired, *supra* n.4.

[38]*E.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (pervasiveness of broadcasting requires separate standards under First Amendment); Television and the Hearing Impaired, *supra* n.4, 34 FED. COMM. L.J. at 96-97, 117-19, and articles cited therein.

[39]Nondiscrimination Employment Practices of Broadcast Licensees, *supra*, 13 F.C.C.2d at 769, 775-77.

[40]Repondents submit that all broadcasters are recipients of federal financial assistance by their receipt of extremely valuable licenses, with "legitimate renewal expectancies" (FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775, 805 (1978)), at no cost to the licensee. This passive type of subsidy was recognized as financial assistance by the courts prior to passage of the Rehabilitation Act of 1973. McGlotten v. Connolly, 338 F.Supp. 448, 461 (D.C.Cir. 1972). As the Court recently noted, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it . . . adopts a new law incorporating sections of a prior law. . . ." Merrill Lynch Pierce Fenner & Smith v. Curran, 50 U.S.L.W. 4454, 4465, n.66 (U.S. May 4, 1982), *citing* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). The Rehabilitation Act was modeled after Title VI of the Civil Rights Act, 42 U.S.C. §2000d, the statute in issue in *McGlotten*. For a broader discussion of this point see Brief for Appellant, Gottfried v. FCC, below, and Petition for Writ of Certiorari, Gottfried v. FCC, S.Ct. No. 81-651. In GLAD v. KCET, *supra* n.1, the Court found that the FCC grants federal financial assistance when it grants a license to use the public airwaves and when it gives broadcast licensees the services of federal personnel, free of charge. See Findings of Fact 27-31.

broadcasters, who clearly are recipients of federal financial assistance and subject to Section 504 of the Rehabilitation Act.[41] We thus turn now to the Commission's obligation to consider this in the context of a license renewal proceeding.

C. The FCC Had an Independent Duty to Consider the Policy of Nondiscrimination Against the Deaf in the License Renewal Context of This Case.

1. The Commission's Obligation Under Section 309 of the Communications Act.

Under Section 309 of the Communications Act, 47 U.S.C. 309, the FCC must consider each broadcast renewal application according to the public interest, convenience and necessity. If substantial and material questions of fact are raised regarding this determination, or if for any reason a specific public interest finding cannot be made, Congress requires the Commission to designate the application for an evidentiary hearing. *Id.*; *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (D.C.Cir. 1974) (en banc); *United Church of Christ — I, supra*, 359 F.2d at 1007 (D.C.Cir. 1966).

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[41]It is perplexing and ironic that the Commission would now express fears to this Court that the court's decision below might also require consideration under the public interest standard of allegations of sex discrimination and age discrimination, citing to 20 U.S.C. §1681(a) and 42 U.S.C. §6102. (FCC Br. at 44.) For not only would discrimination by any licensee against these groups appear to raise character questions, NOW v. FCC, *supra*, 555 F.2d at 1017 (D.C. Cir. 1977), but also the Commission has specifically taken the affirmative step of including women, the elderly and youth, along with ethnic minorities, as distinct categories of leaders requiring ascertainment by all television broadcasters at renewal time. *Id.*; Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 447 (1975), *reconsid. granted in part*, 61 F.C.C.2d 1 (1976). Rather than a parade of horribles, the Commission's argument aptly reinforces the point that programming service to minorities is a goal of broadcast regulation, and that the Commission has arbitrarily discriminated against the deaf and disabled by refusing to recognize the relevance of the Congressional policy expressed in the Rehabilitation Act to its regulatory duties.

Upon failure by a licensee to meet *its* burden to show that renewal would serve the public interest, a hearing may be designated regardless of whether or not the licensee is in violation of a specific FCC rule. Thus in *Alabama Educational Television Commission*, 50 F.C.C.2d 461 (1975) (hereinafter *AETC*), the licensee's discriminatory practices in its programming did not violate a particular rule but was nevertheless found violative of the public interest standard.[42]

In *AETC* the FCC denied eight television license renewal applications on a "compelling inference that AETC followed a racially discriminatory policy in its overall programming practices during the license period." *Id.*, 50 F.C.C.2d at 465. The Commission stated, "A policy of discrimination may be inferred from conduct and practices which display a pattern of underrepresentation or exclusion of minorities from a broadcast licensee's overall programming."

The Commission may, of course, adopt rules to specify criteria by which applications will be judged.[43] On the other hand, license renewal is the statutory process by which relevant and appropriate rules and policies are brought to bear on particularized situations. *E.g.*, *Washington Utilities and Transportation Commission v. FCC*, *supra* n.43, 513

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[42]Hearings have been imposed for other failures to make public interest determinations on issues outside of specific FCC rules. *E.g.*, West Coast Media, 79 F.C.C.2d 610, 625 (1980), *recon. denied*, 86 F.C.C.2d 331 (1981), *appeal pending*, D.C.Cir. No. 81-1548 (promise versus performance); Henry v. FCC, 302 F.2d 191 (D.C.Cir. 1962) ("ascertainment" of community needs); Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C.Cir. 1958) (potential economic injury to existing stations a ground for hearing on a new application). Cf. FCC v. WOKO, Inc., 329 U.S. 223 (1946) (misrepresentation).

[43]United States v. Storer Broadcasting Co., 351 U.S. 192, 202-05 (1956); ATT v. FCC, 539 F.2d 767, 774-75 (D.C.Cir. 1976); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142, 1160-64 (9th Cir.) *cert. denied*, 423 U.S. 836 (1975).

F.2d at 1168. Thus it was unreasonable for the Commission to deny rule making, twice in this case, and then refuse to apply the congressional nondiscrimination policy to the Los Angeles market because no rules have been adopted. This Catch-22 jurisprudence has no place in our system.

In the past, the Commission has considered relevant statutory policies prior to the adoption of specific rules. For example, it long considered questions of concentration of control of the media before its adoption of rules limiting such ownership.[44] Furthermore, from 1969 to 1972 the Commission considered environmental issues on an ad hoc basis before instituting rulemaking to incorporate the National Environmental Policy Act of 1969 into its processes.[45] With regard to discriminatory programming, furthermore, the Commission has found it so inimical to the public interest that it did not even bother to mention the Civil Rights Laws. See, *e.g.*, *Mississippi Authority for Educational Television*,

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[44]*E.g.*, Frontier Broadcasting Co., 21 F.C.C.2d 570 (1970), *dismissed for voluntary divestitures*, 35 F.C.C.2d 875 (1972); Elyria-Lorain Broadcasting Co., 6 P&F Radio Reg. 2d 191 (1965); Miami Broadcasting Co., 1 P&F Radio Reg. 2d 43 (1961).

The Commission argues that consideration of antitrust factors as part of the Communications Act derives from Section 313 of the Act, 47 U.S.C. §313. (FCC Br. at 46.) However Section 313 simply allows judges to revoke licenses as a remedy for violations of the antitrust laws. The diversification factor in broadcast licensing, on the other hand, derives from the first amendment, the public interest standard, and Sections 1 and 307(b) of the Communications Act, 47 U.S.C. §§151, 307(b). *See* FCC v. Nat'l Citizens Committee for Broadcasting, *supra*, 436 U.S. at 794-96; Nat'l Broadcasting Co. v. United States, *supra*, 319 U.S. at 217.

[45]Implementation of the National Environmental Policy Act, 36 F.C.C.2d 108, n.1 (1972); Letter to Russell Train *cited in* Nat'l Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095, 1106, n.47 (D.C.Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). In the latter case the court stated that the Commission was "obligated, to determine how best to accommodate the mandate of NEPA with its own mandate . . . ." *Id.*, n.47.

19 P&F Radio Reg. 2d 372 (1970). See also *Chapman Radio and Television Co.*, 24 F.C.C.2d 282 (1970).

In the instant case, the Commission has taken the erroneous position (1) that the Rehabilitation Act is "unrelated" to the underlying purposes of the Communications Act (FCC Br. at p. 43), (2) that the Commission can ignore charges of discrimination against the deaf at renewal time, and (3) thus that it can defer and deflect the question of broadcasting service to the deaf indefinitely despite Congress' mandate in Section 504. Respondents submit that where the Commission has chosen not to proceed by rulemaking, and has indicated that the method of service is a matter for each individual licensee to determine (*Deaf Viewers, supra*), it must face up to and address specific allegations that a licensee did not meet its minimal public interest statutory or constitutional obligations in the license renewal context.

2. The Court of Appeals Correctly Reversed the FCC's Arbitrary Attempt to Avoid Its Statutory Responsibilities by Deferring to Other Agencies.

The Commission does not deny that the court of appeals has a duty to correct improper or unreasonable action by the Commission for failure to act in consonance with pertinent Federal legislation. Thus the Commission states that there might be jutification for the decision of the court of appeals "if Section 504 would otherwise go unenforced, but that is far from the case." (FCC Br. at 29). In truth, that is exactly the case. The saga of the bureaucratic failure

to establish a compliance standard under Section 504 for public television is set forth *GLAD v. KCET, supra* n.1.[46]

The Commission is plainly wrong in its contention that it was unnecessary for it to consider KCET's compliance with Section 504, because other agencies were allegedly enforcing KCET's obligation under that statute.

(1) The Commission is in error in stating that the Department of Commerce, the agency which provided the funds for the building of KCET's station, has "adopted procedures for receiving and resolving complaints for noncompliance with Section 504." (FCC Br. at 29). The Department of Commerce has *no* Section 504 regulation specifically applicable to public broadcasting.[47] Furthermore,

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[46]In that case, the court stated that the responsible government agencies, including the Department of Education, the Department of Justice, and the Federal Communications Commission have delayed unreasonably in issuing regulations implementing Section 504 as it applies to public broadcasting (Conclusion of Law 9). The Court also found that the "sweeping and arbitrary refusal by the government to promulgate any regulation providing for equal access to public television by the deaf and hearing impaired denies . . rights secured to them by Section 504 and denies them due process of law and the equal protection of the laws guaranteed by the Fifth Amendment . . . and denies them access to ideas and information necessary to exercise their rights as first class citizens in violation of the First Amendment. . . ." (Conclusion of Law 11).

[47]The Commission states that the Department of Commerce "has temporarily . . . adopted the Section 504 regulation originally isued by HEW." (FCC Br. at p. 9, nn. 10 & 11). The publication in the Federal Register (46 Fed.Reg. 37068-37069 (1981)), mentioned by the FCC, was the result of an order issued in the case of Paralyzed Veterans of America, et al. v. Smith, et al., D.C., Central District of California No. 70-1979 WPG. The Findings of Fact and Conclusions of Law, upon which the order was based, can be found in the Petition for Writ of Certiorari in Bagstad v. Orange County Transit District, No. 81-590. When the FCC summarily dismissed respondent's petition, the Department of Commerce had no procedure to enforce Section 504, and has only recently adopted a general procedure, which makes no specific mention of public broadcasters, Dep't of Commerce, Prohibition of Discrimination Against the Handicapped, 47 Fed.Reg. 17744 (April 23, 1982). The FCC's references to the Department of Commerce's so-called regulations (nn. 11-16) were to *proposed* regulations only.

this is *post hoc* rationalization of counsel, since the Commission maintained below that the only appropriate agency for enforcement was HEW. (FCC App. 60a, 71a.)

(2) The FCC's reliance on the complaint procedure of HEW, later Department of Education, is misplaced. To state, as the Commission does, that the Department of Education "stands ready to review the programming of stations receiving its assistance to determine whether the needs of the hearing impaired have been met as required by Section 504" (FCC Br. at 29-30) is misleading at best. When the FCC dismissed Respondent's petition it knew that HEW had no plans to act on a Section 504 complaint, "pending the enactment of legislation by Congress to determine which agency has the responsibility to enforce compliance with the Rehabilitation Act. (FCC App. 71a.)[48] Furthermore, in

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[48]The Administrative Complaint which was allegedly resolved on February 12, 1982, was filed with HEW on March 13, 1978. The inadequacy of the Administrative Complaint procedure was noted in *GLAD v. KCET, supra*, where the following colloquy took place in court concerning that complaint:

"THE COURT: I thought they always gave notice to the other side of what they were doing.

MS. SOBEL [government counsel]: No.

THE COURT: You mean they do it ex parte?

MS. SOBEL: That's right

THE COURT: In star chamber?

MS. SOBEL: The title VI enforcement procedures permit a complainant to make the complaint. At that point they have no further involvement in the processing of the complaint. That is the whole basis if you read the Supreme Court —

"THE COURT: No, we are not talking about procedure, we are talking about information, just to let them know what is happening.

MS. SOBEL: The under —

THE COURT: So that maybe they can answer some of the questions also. It isn't just one side that has all the answers. I always thought in a dispute there were two sides. And you heard both sides and you got the evidence from both sides to make a determination.

MS. SOBEL: Well, that would be one possible way of doing it. It is not how it is set up.

THE COURT: That is one possible way. I thought that was the way we did it in this country."

See also J.A. 158, 162-63.

Cannon v. University of Chicago, 441 U.S. 677, 708, n.41 (1979) this Court found the same HEW procedure used in the present case to be inadequate as an exclusive enforcement procedure. The Court consistently refused to withhold a private cause of action, where those entitled by statute to a benefit do not have "the ability to activate and participate in the administrative process contemplated by the statute." *Id. See also Miener v. State of Missouri*, 673 F.2d 969, 973-74 (8th Cir. 1982).

In any event, the Department of Education's "resolution" of the complaint did not purport to deal with the question of whether KCET had complied with all of its Section 504 obligations. Rather, the Department of Education carefully limited its "resolution" to a finding that "KCET is in compliance with Section 504 with respect to assistance it receives from [the Department of Education]." This determination, furthermore was based solely on data supplied by the licensee for 1981, four to seven years subsequent to the relevant data for the license proceeding here under review. *Cf. United Church of Christ — I, supra* (licensee runs on its record from previous license term).

(3) Moreover, the FCC is the single agency with expertise over the broadcasting industry, as was forcefully argued by KCET in the district court (J.A. 148-150), and as the Commission argues here to justify the standards of deference accorded by the courts.[49]

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[49]That is, the same arguments that warrant judicial deference to the Commission's decisions in this matter also defeat the Commission's arguments for deference to HEW. If, on the other hand, the Commission has no expertise with respect to Section 504 and public broadcasters, then the courts need not defer to the Commission for their statutory interpretation of Section 504. *See, e.g., FCC v. RCA Communications*, 346 U.S. 86, 91 (1953) (contract interpretation by agencies reviewed de novo). The Commission cannot have it both ways.

(4) The FCC defends its position stating that the Department of Justice, "the agency now responsible for coordinating implementation of Section 504, is presently preparing regulatory guidelines concerning what obligations Section 504 imposes on broadcasters and producers receiving federal financial assistance." (Br. for FCC 30). The Commission does not explain how the fact that the Department of Justice may in the future issue such a regulation demonstrates that there was no occasion in 1978 for the Commission to inquire whether KCET had discriminated against deaf persons during its 1974-1977 license term. Moreover, the Department of Justice has no expertise in the field of broadcasting, and does not even grant federal financial assistance to broadcasters.

(5) In short, the activities of the other federal agencies do not justify inaction by the FCC. All else aside, the Commission must make its own determination as to the public interest merits of an application, regardless of the action of another agency. *E.g., United States v. Radio Corp. of America, supra*, 358 U.S. at 350-51; *NOW v FCC, supra*, 555 F.2d at 1017-18.

(6) Regardless of the findings of other agencies, the Commission has the ability to achieve different results from the other agencies. In this regard, this Court's discussion of the private cause of action under Title IX in *Cannon v. University of Chicago*, 441 U.S. 677, 703-08 (1979), again pertains. The Court found that private individual relief "is not only sensible but is also fully consistent with — and in some cases even necessary to — the orderly enforcement of the statute." *Id.*, 441 U.S. at 705-06. It is evident that to this day there is no comprehensive enforcement of Section 504 in public broadcasting. Pursuit of an individual's or groups' remedies at the Federal Communications Commis-

sion, to advance the broader public interest, is necessary for the orderly enforcement of the statute in this instance.

It is clear that only the Federal Communications Commission can effectively provide the relief needed by the deaf.

As the Commission itself has stated in response to allegations that it would be better policy for the FCC not to attempt to duplicate the EEOC's processes regarding employment discrimination by broadcasters:

> [A] substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity. However, we need not decide that point. It is enough that the importance and urgency of equal employment opportunity policy in the other areas covered command its implementation on every appropriate front. Action by the Commission will complement, not conflict with action by bodies specially created to enforce the policy. . . . It is also clear that we have an independent responsibility to effectuate such a strong national policy in broadcasting, and that we need not await a judgment of discrimination by some other forum or tribunal.

Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240, 240-241 (1969).

D. The Court of Appeals Had the Duty to Correct Improper or Inadequate Action by the Commission Not Only for Failure to Act in Consonance With Pertinent Legislation but Also for Failure to Require Its Licensee to Comply With Constitutional Commands.

In *Norwood v. Harrison*, 413 U.S. 455, 466-67 (1973) this Court emphasized that courts have a heavy duty to scrutinize government's possible involvement in violation

of a constitutional duty. Respondents contend that in this case the Commission violated its constitutional duty not to sanction discrimination against the nation's deaf minority by its licensee.

Concededly, the Commission has imposed no requirement that any television licensee — commercial or public — provide captioning or any other form of non-emergency visual program material for the deaf. Because the Commission has imposed no such requirement on its licensees it decided to take no action against KCET for its failure "to do something that we have not required them to do." (FCC App. 75a). The Commission saw "nothing inconsistent in concluding that licensees are serving the public interest although they are not [providing any service for the deaf] in view of the fact that we have not required licensees to undertake such an activity." (FCC App. 73a). KCET, in turn, asserts that in the absence of FCC guidelines it is free to decide for itself how much of its programming to make available to the hearing impaired (D.C.Cir. J.A. 107). Respondents submit that by its inaction the Commission has encouraged and fostered discrimination against deaf people by KCET.

(1) The Commission plainly provides "tangible aid to KCET by granting it the free and exclusive use of a limited and valuable part of the public domain. *CBS, Inc. v. FCC*, *supra*, 453 U.S. ___, ___, 101 S.Ct. 2813, 2829; *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C.Cir. 1966). The Commission itself has noted the value of the broadcast license it gives free of charge (Fee Refunds and Future FCC Fees, Notice of Inquiry, 69 F.C.C.2d 741, 769 (1978)). In *Norwood v. Harrison*, *supra*, 413 U.S. at 465-466 (1973), the Court stated that government may not induce, encourage, or promote others to accomplish what it is constitutionally forbidden

to accomplish. The Court stated that government may not provide "tangible financial aid" to an educational institution "if that aid has a significant tendency to facilitate, reinforce and support private discrimination". *Id.*, 413 U.S. at 466.

The essential issue in *Norwood*, was whether the textbooks amounted to "tangible aid" that had a "significant tendency" to "support" private discrimination in the schools. The Court said that they did, noting that textbooks are "not legally distinguishable from the forms of state assistance foreclosed by the prior cases." *Id.*, 413 U.S. at 463. The "prior cases" relied on were several lower court decisions[50] which "[t]his Court has consistently affirmed . . . enjoining state tuition grants to students attending racially discriminatory private schools."

It is significant that the Commission itself has noted the substantiality of the argument that, all else aside, it has a constitutional duty not to sanction discrimination. *Nondiscrimination Employment Practices of Broadcast Licensees, supra*, 18 F.C.C.2d at 241.

Because KCET is a public broadcaster its actions constitute "governmental action." Accordingly, the Commission's involvement in the discrimination against deaf persons herein is a "double *fortiori*" case of governmental

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[50]Brown v. South Carolina Board of Education, 206 F.Supp. 199 (S.C.), *aff'd per curiam*, 393 U.S. 222 (1968); Poindexter v. Louisiana Finance Assistance Comm'n., 275 F.Supp. 833 (E.D.La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). *See* Wallace v. United States, 389 U.S. 215 (1967), *aff'g* Lee v. Macon County Board of Education, 267 F.Supp. 458, 475 (M.D. Ala.). Mississippi's tuition grant programs were invalidated in Coffey v. State Educational Finance Comm'n., 296 F.Supp. 1389 (S.D.Miss. 1969); Coffey v. State Educational Finance Comm'n., S.D.Miss., C.A. No. 2906, decided Sept. 2, 1970 (unreported). The latter case involved a statute which provided for tuition loans rather than tuition grants. *See* Green v. Connolly, 330 F.Supp. 1150 (DC), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

action. *See Poindexter v. Louisiana Financial Assistance Commission*, 275 F.Supp. 833, 854 (E.D. Louisiana, New Orleans Div. 1967) *aff'd per curiam*, 389 U.S. 693 (1968).

(2) Since KCET is a public broadcaster, this case does not require resolution of the issue whether *commercial* broadcasters are engaged in "governmental" activities — a question that divided the Court in *CBS v. Democratic National Committee*, 412 U.S. 94 (1973). In that case, Justice Brennan, joined by Justice Marshall, contended that the public nature of the airwaves, the governmentally created preferred status of broadcast licensees and the pervasive federal regulation of broadcast programming creates such an interdependence between the government and broadcast licensees, as to make the latter's conduct governmental action. (412 U.S. at 173-179).

Justice Douglas, concurring at p. 149 stated: "Public broadcasting, of course, raises quite different problems from those tendered by the [commercial] TV outlets involved in this litigation." Respondents are aware that Justice Douglas was referring to the Corporation for Public Broadcasting, rather than to a public station such as KCET. Still, Respondents submit, KCET's conduct must be deemed governmental. Among other things, KCET had its facilities built with federal funds and receives a huge amount of direct federal funding. (See J.A. 129-39, 146, 153-55.)

The linkage between KCET and the federal government is so extensive and varied as to bring the station's conduct within *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952). In *Pollack*, the Court held that a privately owned bus company, franchised by the federal government, and regulated by the Public Utilities Commission of the District of Columbia, must be subjected to constitutional constraints. The Court noted that the bus company

operated its services under the regulatory supervision of the Public Utilities Commission, an agency authorized by Congress. The Court explained that its finding of "governmental action" was predicated specifically upon the fact that the agency, pursuant to protests against the challenged policy, ordered an investigation of it and, after formal hearings, ordered its investigation dismissed on the ground that the public safety, comfort, and convenience were not impaired. (343 U.S. at 462). The Court concluded that when the agency dismissed respondent's complaint on the ground that the "public interest, convenience, and necessity" were not "impaired" it embraced the bus company's position. Similarly, in the case at bar, the FCC has affirmatively embraced KCET's position that it has no obligation to provide meaningful programming for the deaf, because the FCC has not imposed any such obligation on the station.

To the extent that deaf persons are discriminated against, and denied meaningful access to KCET's television broadcasting, they are denied rights secured by the First Amendment. Broadcasting necessarily invites reference to First Amendment principles. *CBS v. Democratic National Committee, supra,* 412 U.S. at 122 (1973); *see also FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775, 795 (1978). In *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969), the Court articulated the First Amendment priorities for the broadcast media: "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." In the case of a neglected minority, such as deaf persons, this right is bound up with another — an equality principle inherent in the First Amendment. "[W]ithout access to the 'social, political, moral, and other ideas' which are uniquely available to those who can hear the television, the hearing impaired are treated unequally

by society. Since their needs are as great as those of the constitutional suspect classes, and television is peculiarly well situated to help them, their First Amendment needs" must be met. *Television and the Hearing Impaired, supra*, 34 Fed. Comm. L.J. at 145.

The deaf minority was also denied its due process and equal protection rights secured by the Fifth Amendment when the Commission refused to include in its "public interest" standard the national policy prohibiting discrimination against handicapped persons, even though the Commission recognized it has a duty to embrace in its public interest standard the national policies prohibiting discrimination against other minorities, and women.

Since the Commission failed to do anything to prevent discrimination against hearing impaired persons by its broadcast licensees it does not appear significant whether the label of "suspect class", "middle-tier", or "rational" analysis is employed in evaluating the Commission's conduct. To require *nothing* of its licensees in the light of Congressional enactments, in light of the avowed national policy and command to all federal agencies to take action to enable handicapped persons to achieve their full capability, foster their self-sufficiency and independence, and integrate them into the community was, it is submitted, simply irrational.

If judicial labeling were called for, deaf persons would appear to have a "discrete and insular" character. They have been subjected to a "history of purposeful unequal treatment", relegated to "a position of political powerlessness" and possess "immutable characteristics" linked to a history of prejudice. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products*, 304 U.S. 144, 152, n.4 (1938).

Was there any "compelling necessity" for refusing to consider whether KCET had acted unreasonably or discriminatorily during its 1974-1977 license term? If it be argued that only a "middle-tier" analysis was called for, what were the "important" and "substantial" objectives of the Commission in doing nothing, and how was this complete inaction "substantially related to achievement" of such objectives? *See Craig v. Boren*, 429 U.S. 190, 200-210 (1976); *Griswold v. Connecticut*, 381 U.S. 479-485 (1965). And how was it "rational" to sweep aside so broadly all rights of the deaf when alternative means were available to meet their fundamental needs.

The court of appeals, having found that the Commission acted unreasonably, properly remanded the case to the Commission for further consideration, in accordance with the Administrative Procedure Act. The Court did not purport to put itself in the shoes of the Commission. Judicial action was necessary because the Commission had defaulted in its duties.

E. The Appropriate Standard for Television License Service to the Deaf Is Not Before the Court in the Present Posture of This Case.

This Court granted certiorari to only one question of the several raised on review of the court's decision below. It properly denied KCET's attempts to review the question of the appropriate standard of compliance with Section 504, since the court of appeals had specifically deferred on that question to the Commission's discretion. The reasonableness, or abuse, of that discretion could not be reviewed in the context of this case because the Commission itself had not addressed it. Thus the Commission on remand has the opportunity to address this issue de novo.

The court of appeals, in fact, suggested "no *a priori* preference" among a "variety of dispositional alternatives." (FCC App. 28a.) It specifically conceded a great latitude on the Commission's part to "assess the station's willingness — as measured against its capacity and its viewers' need — to provide programming for the aurally handicapped." (FCC App. 27a.) The case thus does not involve the difficult questions raised, but left unanswered in *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979), as to the extent of modification needed to avoid findings of illegal discrimination.

Thus Respondents do not respond in this Court to the substantive specifics of the appropriate level of service. The point of this case, solely, is that the Commission cannot ignore the rights of the deaf vis-a-vis the public interest regulation of broadcasting.

CONCLUSION.

In view of the narrowness of the court's decision below, and its accurate statement of the law, and in view of the interlocutory posture of this case, Respondents respectfully urge this Court to affirm the court below.

Respectfully submitted,

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June 4, 1982

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**Not intended to reflect the position of Regents, University of California. Counsel acknowledge the research assistance of UCLA law student Norma Iris Garcia.

Respondent's Brief

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Nos. 81-296, 81-799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, *et al.*,
Petitioners,
v.
SUE GOTTFRIED, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT CBS INC. IN SUPPORT OF PETITIONERS

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BRIEF FOR RESPONDENT CBS INC. IN SUPPORT OF PETITIONERS

STATEMENT OF THE CASE

CBS Inc.[1] adopts the Statement set forth in the Brief for Petitioner Federal Communications Commission.[2]

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[1] CBS Inc. participated as an intervenor in the proceedings in the Court of Appeals. CBS Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates. (We construe the terms "parent companies," "subsidiaries" and "affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party.)

[2] CBS Inc. also adopts the statements of the "Question Presented," "Opinions Below," "Jurisdiction," and "Statutes and Regulations Involved," set forth in the Federal Communications Commission's brief.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the Communications Act of 1934 gives the Federal Communications Commission the responsibility for determining the public interest, and that reviewing courts are not authorized to substitute their own judgment of what the public interest requires. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

Where, as in the present case, the Commission has determined that the public interest would not be served by Commission enforcement of a statute other than the Communications Act, the court of appeals has no basis for overruling that determination. Indeed, this Court has made clear that—in the absence of a Commission determination that enforcement of a statute is necessary to serve the public interest in broadcasting—the Commission is not even authorized, much less required, to enforce such a provision. *See, e.g., United States v. RCA*, 358 U.S. 334 (1959); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

The court of appeals' holding would frustrate the purposes of both the Communications Act and the Rehabilitation Act. First, the decision would result in a conflict among agencies in the enforcement of a complex and ambiguous statute. *See Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979). Congress intended that the agencies that provide federal financial assistance enforce the provisions of Section 504 with respect to the recipients of such assistance. The Departments of Education and Commerce are primarily responsible for enforcing Section 504 in the case of public broadcasters, and they are developing compliance guidelines. Enforcement by the Commission will subject public broadcasters to conflicting standards of compliance. *See NAACP v. FPC, supra*, 425 U.S. at 673-74 (Burger, C.J., concurring).

Second, the court of appeals' decision would interfere with the Commission's own policies in this area. In a lengthy rulemaking proceeding, the Commission decided that various methods of captioning programs for the hearing-impaired should be authorized and encouraged, but the Commission specifically decided not to *require* licensees to provide "open or closed captioning or any other form of special visual program material . . ." The Commission decided that "there were too many unanswered questions—technical and financial"—with respect to the feasibility of various captioning methods. The Commission was concerned that imposing a specific requirement at this time might foreclose the development of newer technologies such as teletext, which could provide a wide range of services to the general public as well as to the hearing-impaired. By requiring the Commission to address and resolve these issues in individual renewal proceedings, the court of appeals has also frustrated the Commission's determination to consider these problems through the preferred approach of general rulemaking.

Third, requiring the Commission to enforce all laws and "national policies" would enormously complicate license renewal proceedings and distract the Commission from its principal task of defining the public interest in broadcasting.

Finally, even if the Commission were required to incorporate generally applicable "national policies" into its public interest standard, Section 504 cannot reasonably be deemed to incorporate such a national policy. It is not a law of general application, but applies only to recipients of federal financial assistance. A Congressional requirement that recipients of federal funds must abide by special requirements is not a national policy that should be enforced by an agency unfamiliar with its requirements and not charged with its implementation.

ARGUMENT

Introduction

The specific question presented in this case is whether the Federal Communications Commission (the "FCC") is required, under the public interest standard of the Communications Act of 1934, to enforce the requirements of Section 504 of the Rehabilitation Act of 1973 against public broadcasters even though, under that statute, enforcement of Section 504 is to be undertaken by the Departments of Education and Commerce and other funding agencies.[3] The issues presented have broad significance with respect to the role of the FCC in formulating communications policy.

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[3] Section 504 provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation is so submitted to such committees." 29 U.S.C. § 794 (1976 & Supp. II 1978).

The court held that Section 504 applies to public broadcasters, because such stations receive funds from federal agencies and because those agencies have viewed Section 504 as applicable. *Gottfried v. FCC*, 655 F.2d 297, 306-07 (D.C. Cir. 1981), reprinted in the appendix to the FCC's petition for certiorari ("FCC App.") at 16a-19a. The Commission did not dispute that Section 504 applied to public broadcasters but held that the Commission was not required to enforce or adjudicate a public broadcaster's compliance with Section 504 in a license renewal proceeding. *License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California*, 69 F.C.C. 2d 451, 464, FCC App. 60a.

The Communications Act of 1934, as amended, authorizes the Federal Communications Commission to grant and to renew broadcast licenses upon a finding that the "public convenience, interest, or necessity" will be served.[4] In this license renewal case—as in a number of cases that have recently been decided by this Court—the court of appeals has disagreed with the Commission's determination of the public interest. This time, the court of appeals held that

> "[t]he FCC's 'public interest' mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under Section 504 of the Rehabilitation Act of 1973." [5]

The court ruled that the Commission must hold license renewal proceedings to consider the extent to which a noncommercial licensee has complied with Section 504 of the Rehabilitation Act of 1973, even though the Commission had determined that it should not attempt to enforce the requirements of Section 504 but should permit licensees maximum discretion to determine how best to serve the programming needs of the hearing-impaired and the general viewing public.[6]

By requiring that the Commission consider an applicant's compliance with any statute that, in the view of the court, reflects "national policy," the court of appeals has carved out an unwarranted exception to the Commission's authority to define the public interest. While

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[4] 47 U.S.C. §§ 303, 307(a), 308(a), 309(a), (d) (1976); 47 U.S.C.A. § 307(d) (1981 Supp).

[5] 655 F.2d at 308, FCC App. 20a.

[6] The Commission's determination in this respect serves policies of the Communications Act and the First Amendment by allowing broad discretion to licensees in the program area. See Brief for the Federal Communications Commission ("FCC Brief"), Part III.

the court of appeals held that no similar obligation exists with respect to commercial broadcasters—since they are not subject to Section 504—the court of appeals' decision would, if upheld, severely limit the Commission's authority generally to define the "public interest" obligations under the Act.[7]

I. The Commission Should Not Be Required To Enforce "National Policies" Not Contained in the Communications Act.

A. This Court Has Consistently Held That It Is the Commission's Responsibility To Determine the Public Interest With Respect to Broadcasting.

Last term, in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), this Court reaffirmed the Commission's primary responsibility under the Communications Act to define the public interest. The Court reversed a decision of the court below that the Commission was required, under the public interest standard, to review changes in broadcasters' entertainment formats. The Court held that the

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[7] The court of appeals and the Commission agreed that mere grant of a license to broadcast does not constitute "Federal financial assistance" and that Section 504 thus does not apply to commercial broadcasters. 655 F.2d at 312, FCC App. 30a. It is noteworthy that the court suggested that the Commission, in implementing the public interest with respect to commercial broadcasters, "may still be obliged to weigh the national policy of the Rehabilitation Act," and that, "in our view television, both public and commercial, should be made available to persons with impaired hearing now." 655 F.2d at 306, FCC App. 14a.

However, since the Rehabilitation Act itself imposes no obligation on commercial broadcasters, the court determined that "the Commission has a range of discretion in assessing what commercial stations must do in the public interest, and in consideration of both its expertise and its efforts in this area, we defer to its judgment *at this time*." *Id.* (Emphasis supplied.)

Commission's decision not to regulate format changes was within its discretion and that the court of appeals should not have substituted its view of what the public interest required. In doing so, the Court reaffirmed the Commission's "broad power" to define the public interest: [8]

> "Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. . . . The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for 'the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance.'" [9]

The *WNCN Listeners Guild* decision was but the latest in a long series of judicial decisions recognizing the Commission's responsibility under the Act to determine the public interest. As the Court stated, "It is common ground that the Act does not define the term 'public interest, convenience, and necessity'." [10] And, as early as 1940, the Court held that defining the "public interest" in broadcasting was precisely the task for which the Commission was created:

> "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, *it serves as a supple instrument for the exercise of discretion by the ex-*

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[8] 450 U.S. at 594.

[9] *Id.* at 596, *quoting FCC v. NCCB, supra*, 436 U.S. at 810.

[10] *FCC v. WNCN Listeners Guild*, 450 U.S. at 593.

pert body which Congress has charged to carry out its legislative policy." [11]

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[11] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940) (emphasis added).

In the Radio Act of 1927, ch. 169, 44 Stat. 1162, Congress initially gave reviewing courts a much greater scope of review. Section 16 of that Act provided that the Court of Appeals of the District of Columbia, in reviewing licensing decisions of the Federal Radio Commission, could "alter or revise the decision appealed from and enter such judgment as to it may seem just." Radio Act of 1927, § 16.

The court of appeals construed Section 16 as authorizing *de novo* review of Commission decisions and as authorizing the court to make its own judgment of what the public interest required. *See, e.g., Chicago Federation of Labor v. FRC*, 41 F.2d 422 (D.C. Cir. 1930); *Great Lakes Broadcasting Co. v. FRC*, 37 F.2d 993 (D.C. Cir. 1930) *cert. dismissed*, 281 U.S. 706 (1930); *General Electric Co. v. FRC*, 31 F.2d 630 (D.C. Cir. 1929), *cert. dismissed*, 281 U.S. 464 (1930). This Court agreed that Section 16 empowered the court of appeals to act, in effect, as "a superior and revising agency," and that, accordingly, this Court was without jurisdiction to review the court of appeals' decisions. *FRC v. General Electric Co.*, 281 U.S. 464, 469 (1930).

Congress reacted to this Court's decision by explicitly limiting the court of appeals' authority. Section 16 was amended to provide

> "[t]hat the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious."

Act of July 1, 1930, ch. 788, 46 Stat. 844. In *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933), this Court found that the standard of review in the amended Section 16 was

> "in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review."

Section 16, as amended, was incorporated without change as Section 402(e) of the Communications Act of 1934. 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 402(g) (1976)). Subse-

More recently, in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978) ("*FCC* v. *NCCB*"), the Court made clear that the court of appeals, in reviewing Commission actions, "is not empowered to substitute its judgment for that of the agency." [12]

Thus, the law is clear that judicial review of Commission public interest determinations is narrow in scope. The Commission does not, of course, have unfettered discretion. Commission action must be consistent with the First Amendment and the policies of the Communications Act.[13] And the Commission may not depart from past policies and views without providing an explanation.[14] But, in general, the reviewing court's role is limited. It may not second-guess the Commission's determination of where the public interest lies, particularly when the Commission has determined not to regulate.[15]

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quently, Section 16's standard of review was essentially applied to all agencies by Section 10(e) of the Administrative Procedure Act, which limits the scope of judicial review of an agency's policy judgments to deciding whether the agency's "action, findings and conclusions" are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976). The standards of the Administrative Procedure Act now apply to FCC decisions. 47 U.S.C. § 402 (1976). *See* Act of July 16, 1952, ch. 879, § 14, 66 Stat. 711.

[12] 436 U.S. at 803, *quoting Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

[13] *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969). *Cf. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

[14] *See, e.g., Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1025 (D.C. Cir. 1971).

[15] *See, e.g., FCC v. NCCB, supra*; *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra.*

B. The Commission Is Not Required To Incorporate All Laws and "National Policies" Enacted by Congress into the Public Interest Standard.

1. *This Court Has Made Clear That the Commission Is Not Required to Enforce Other Statutes and "National Policies".*

The decision below echoes the court of appeals' decision in *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), which this Court recently reversed. Overruling the Commission's decision not to regulate radio formats, the court of appeals acknowledged that it had "neither the expertise nor the constitutional authority to make 'policy' as that word is commonly understood." But the court of appeals maintained that its interpretation of the public interest standard of the Act represented "not a *policy*, but rather the *law* of the land as enacted by Congress." [16]

In its decision in this case, the court of appeals again purports to find that the "law" incorporates the court's own view of communications policy. The court ironically seeks to distinguish *WNCN Listeners Guild* on the ground that, "[a]lthough the 'public interest' standard requires judgments of policy, . . . it also contains an irreducible element of law." [17] According to the Court, the Commission must—as a matter of law—construe the public interest standard to incorporate the legal obligations of Section 504 of the Rehabilitation Act and, presumably, other statutes that reflect "national policy." [18]

There is no support for this conclusion. Not only has this Court not required the Commission to incorporate national laws and policies into the public interest stand-

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[16] 610 F.2d at 854 (emphasis in original). The court stated that it was simply "interpreting the 'law.'" *Id.*

[17] 655 F.2d at 308, FCC App. 19a.

[18] 655 F.2d at 308, FCC App. 20a.

ard; it has held that the Commission's authority to enforce such laws and policies is limited.

Thus, in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953), the Court held that "it is improper for the Commission to suppose that the standard it has adopted is to be derived without more from a national policy defined by legislation and by the courts." The Commission had sought to justify a decision authorizing telegraph service by a new competitor on the ground that the "national policy in favor of competition" required that result.[19] This Court reversed, holding that the Commission may not incorporate a "national policy" into the "public interest" standard unless the Commission has made its own determination that the policy will maximize the public interest in the communications industry:

> "Had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation. . . . Our difficulty arises from the fact that while the Commission recites that competition may have beneficial effects, it does so in an abstract, sterile way. *Its opinion relies in this case not on its independent conclusion, from the impact upon it of the trends and needs of this industry, that competition is desirable but primarily on its reading of national policy, a reading too loose and too much calculated to mislead in the exercise of the discretion entrusted to it.*" [20]

In United States v. RCA, 358 U.S. 334 (1959), this Court held that the FCC's public interest mandate did not either require or permit the Commission to determine whether an applicant had violated the antitrust laws. The Court identified two provisions in the Communications Act that "deal specifically with antitrust considera-

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[19] 346 U.S. at 89.

[20] 346 U.S. at 94-95 (emphasis added).

tions, Sections 311 and 313."[21] Section 313 provides, first, that the antitrust laws are fully applicable to "the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications," and, second, that courts are authorized to impose, as one of the penalties for an antitrust violation, revocation of the guilty defendant's station license. Section 311 provides that the Commission may not subsequently grant a license or construction permit to any person whose license has been revoked by a court under Section 313.

This Court demonstrated that the legislative history of Sections 311 and 313 showed Congress' intention that only the courts and not the Commission were to determine whether an applicant had, in fact, violated the antitrust laws. Congress specifically

> " 'tried to get away from placing upon the [agency] the determination of a judicial question of that character. That involves, of course, a determination as to facts; it requires a knowledge of the law and it requires an application of the law to the facts, and then it requires the exercise of judicial powers, if you leave that in [the Commission's] discretion, and [Congress] tried to lift it away from the [Commission]'."[22]

Moreover, Congress specifically rejected "a provision permitting refusal of a license for antitrust violations in the absence of a judicial determination."[23]

In *NAACP v. FPC*, 425 U.S. 662 (1976), this Court again made clear that an agency's mandate to regulate

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[21] 358 U.S. at 339.

[22] 358 U.S. at 341, *quoting* Hearings Before the House Committee on the Merchant Marine and Fisheries on H.R. 5589, 69th Cong., 1st Sess. 27.

[23] 358 U.S. at 342.

in the "public interest" does not permit the agency to implement "national policies" unless those policies are also found to serve the public interest in the agency's specific area of responsibility and expertise. There it was claimed that the Federal Power Commission was obligated to enforce "federal legislation defining the national interest in ending employment discrimination" [24] as part of its public interest mandate. The Court held that the agency was authorized under its "public interest" mandate "to consider the consequences of discriminatory employment practices on the part of its regulatees *only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest.*" [25]

To be sure, this Court has permitted the Federal Communications Commission to take into account statutes and "national policies" when the Commission has reasonably determined that such statutes and policies are directly related to its own specific regulatory responsibilities. But this Court has never suggested that the Commission is required (or even authorized) to enforce statutes and policies in the absence of such a determination.[26]

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[24] 425 U.S. at 671.

[25] *Id.* (emphasis added).

[26] The Commission has indicated in the present case that, although it would not adjudicate the question whether KCET violated Section 504, any subsequent determination by an appropriate enforcement agency that KCET violated Section 504 would be considered in subsequent renewal proceedings. *Petition for Reconsideration*, 72 F.C.C.2d 273, 278 (1978), FCC App. 71a. Any such consideration would be based not on the Commission's determination that the public interest encompasses the policies of Section 504, but only on the Commission's determination that " 'character' is an essential element of a broadcaster's qualifications," *In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing*, 87 F.C.C.2d 836 (1981), and that "[v]iolations of Federal laws, whether deliberate or inadvertent, raise sufficient question regarding character to merit

In the antitrust area, for example, this Court held that, while the Commission may not enforce the antitrust laws, it could consider the pro-competitive policies of the antitrust laws in enforcing the Communications Act. In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Court upheld the FCC's "chain broadcasting" rules, which had been promulgated in order to foster competition among broadcasting networks. The Court did not hold that the Commission was required to import the antitrust laws into its "public interest" mandate. The Court held only that the Commission was permitted, by its broad "public interest" mandate, to attempt to foster competition.[27] The Court affirmed the Commission's rules because it was satisfied that "the Commission was not attempting to administer the antitrust laws" but was attempting to maximize the public interest in the area of broadcasting. It cited with approval the Commission's explanation of its jurisdiction to issue the rules:

> "We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network prac-

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further examination." *Report on Uniform Policy as to Violation by Applicants of Laws of United States*, 42 F.C.C.2d 399, 402 (1951).

In considering the "character" issue in licensing proceedings, the Commission is concerned with whether an applicant has violated a Federal law, but the Commission relies on decisions of delegated enforcement agencies and does not itself decide whether a law has been violated. *See, e.g., John Hay Whitney*, 28 F.C.C.2d 736, 745 ¶ 21 (1971). *See also, United States v. RCA*, 358 U.S. 334, 346, 352 (1959).

The Commission has recently proposed that it no longer consider, even in connection with the "character" issue, violations of laws that are unrelated to a broadcaster's broadcasting activities. *See Policy Regarding Character Qualifications in Broadcast Licensing, supra*, 87 F.C.C.2d at 846.

[27] *See* the discussion of *United States v. RCA, supra*, at pp. ——.

tices prevent the maximum utilization of radio facilities in the public interest." [28]

Similarly, in *FCC v. NCCB, supra*, the Court found that the Commission had authority to rely on antitrust considerations in support of its rule prohibiting common ownership of a newspaper and a broadcasting station in a single market. The Court made clear that the Commission was not simply incorporating the antitrust laws into its definition of the "public interest," and that "the Commission does not have power to enforce the antitrust laws as such." [29] The Court held only that the "antitrust values underlying the Commission's diversification policy *may* properly be considered by the Commission in determining where the public interest lies." [30]

The court below relies on this Court's decision in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1943), as support for the proposition that the Commission is not only permitted but also required to incorporate all laws and national policies into its "public interest" determinations. 655 F.2d at 308, FCC App. 20a-21a. In that case, the Court considered the extent to which the Interstate Commerce Commission, in deciding whether a merger of rail carriers was in the "public interest," was required to apply federal antitrust laws and policies. The Court found, in the first instance, that "there can be little doubt that the

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[28] 319 U.S. at 223-24, quoting Chain Broadcasting Report at 83, 83 n.3.

[29] 436 U.S. at 795.

[30] 436 U.S. at 795 (emphasis added). In *NAACP v. FPC, supra*, the Court noted that the FCC's rules prohibiting employment discrimination (47 C.F.R. §§ 73.125, 73.301, 73.599, 73.680, 73.793) "can be justified" because the rules serve the Commission's policy goal of ensuring "that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." 425 U.S. at 670 n.7. The Court's dictum suggests only that, because of this related Commission goal, the Commission was permitted to promulgate rules that took account of various other statutes.

Commission is not to measure proposals . . . by the standards of the antitrust laws" and that Congress "did not import the general policies of the antitrust laws as a measure of [the] permissibiilty" of proposals coming before the ICC.[31]

The ICC was required to give some weight in its determination to "the preservation of competition among carriers."[32] But this was not because it was the ICC's task to enforce the antitrust laws but because, to some extent, the preservation of competition itself "aids in the attainment of the objectives of the national transportation policy."[33] The Court found that Congress had specifically defined "national transportation policy" as requiring that the Commission "promote . . . economical . . . service and foster sound economic conditions in transportation and among the several carriers [and] encourage the establishment and maintenance of reasonable charges for transportation services . . . ." Consideration by the ICC of the procompetitive policies of the antitrust laws was necessary because "[t]he preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends."[34]

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[31] 321 U.S. at 84-85.

[32] *Id.* at 85.

[33] *Id.* at 85-86.

[34] *Id.* at 86-87.

In *United States v. RCA*, *supra*, this Court distinguished *McLean Trucking* on the basis of the legislative history of the Communications Act, *see* pp. ———, *supra*, and also on the "controlling" ground that *McLean Trucking* involved ratemaking. 358 U.S. at 348. Thus, even if the Commission might be required to consider the antitrust impact of its actions with respect to common carriers, *see, e.g., United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980), there is no justification for requiring it to adjudicate such matters in connection with broadcast regulation.

As this Court subsequently held, in *California v. FPC*, 369 U.S. 482, 485 (1961):

By contrast, Congress, in the Communications Act, left it to the Commission to define the public interest without detailed Congressional guidance. Indeed, in *National Broadcasting Co. v. United States, supra*, this Court pointed out that Congress had purposely eschewed articulating in detail *any* specific elements of the "public interest" with respect to broadcasting. The Court found that Congress did not intend that the Commission's broad discretion be constrained by any "itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." [35] Any such list of problems and policies

> "would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." [36]

The court of appeals' decision in the present case is not consistent with this Court's decisions. The court of appeals held that the Commission must incorporate the "national policy" of the Rehabilitation Act of 1973 into its "public interest" standard. If, under this Court's decisions in *FCC v. RCA Communications, Inc., United States v. RCA*, and *NAACP v. FPC*, the Commission cannot simply adopt "a national policy defined by legislation and by the courts" [37] without also determining that such a policy serves the Commission's own regulatory goals, surely it cannot be required to adopt such a policy when it specifically finds the policy to be inconsistent with its regulatory task.

"Here, as in *United States v. R.C.A.*, 358 U.S. 334, while 'antitrust considerations' are relevant to the issues of 'public interest, convenience, and necessity' (id. at 351), there is no 'pervasive regulatory scheme' (*ibid.*) including the antitrust laws that has been entrusted to the Commission."

[35] 319 U.S. at 219.

[36] *Id.*

[37] *FCC v. RCA Communications, Inc., supra*, 346 U.S. at 94.

2. *There Are Sound Policy Reasons Why The Commission Should Not be Required to Enforce Section 504.*

Limiting an agency's authority and responsibility to consider other statutes and "national policies" is not simply the result of a jurisdictional technicality; it reflects sound policy. The present case illustrates the extent to which requiring the Commission to enforce other statutes and "national policies" would interfere with the Commission's ability to regulate the communications industry in a coherent fashion.

a. *Conflict Among Agencies.*

First, as Chief Justice Burger's concurring opinion in *NAACP v. FPC*, *supra*, made clear, permitting an agency to enforce statutes and national policies unrelated to its central regulatory task is likely to interfere with, rather than promote, the most efficient enforcement of those laws and policies. This is particularly so in those areas where another agency has the specific enforcement responsibility:

> "The necessary result . . . would be the imposition of another layer of federal regulation of the same subject matter, with the inevitable potential for conflict between administrative agencies. . . . To the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly." 425 U.S. at 673-74 (Burger, C.J., concurring) (emphasis in original).

The court of appeals' decision in this case would result in precisely the sort of inefficient, duplicative regulation with which the Chief Justice was concerned. To the extent that noncommercial broadcasters are subject to Section

504, the responsibility for enforcing compliance with Section 504 has specifically been delegated to the agencies that provide federal funds to those broadcasters—the Departments of Education and Commerce.[38] The Department of Education is in the process of developing guidelines that will define a noncommercial broadcaster's obligations under Section 504.[39] However, under the court of appeals' decision, the Commission must anticipate these guidelines by itself construing Section 504 and applying its own construction to noncommercial licensees on a case-by-case basis.

Even the court of appeals has conceded that construing the requirements of Section 504 is a difficult task because of "the ambiguity of the legislative policy expressed in

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[38] Each funding agency is required to issue regulations for the enforcement of Section 504, applicable to the recipients of its funds. Exec. Order No. 11914, 45 C.F.R. Part 85, to be recodified at 28 C.F.R. Part 41. *See* 46 Fed. Reg. 40,686 (1981). To the extent that a public broadcaster is subject to Section 504 because it receives Federal financial assistance from agencies under the aegis of the Departments of Education and Commerce, it is those Departments that have responsibility for enforcing compliance with Section 504.

It is clear from the legislative history of Section 504 that Congress intended that each agency providing Federal financial assistance to persons or projects enforce the requirements of Section 504 with respect to the recipients of such assistance. Although Section 504 does not explicitly allocate such enforcement responsibilities, the Senate Report accompanying amendments to the Rehabilitation Act in 1974 stated that Section 504 was patterned after the anti-discrimination provisions in Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976) (prohibiting race discrimination) and Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1976) (prohibiting sex discrimination), and that the enforcement provisions of those laws were to be read into Section 504. *See* S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). Those two statutes both require funding agencies to enforce the anti-discrimination provisions. *See* 42 U.S.C. ¶ 2000d-1 (1976); 20 U.S.C. § 1682 (1976).

[39] 46 Fed. Reg. 4954 (1981).

Section 504." [40] This ambiguity virtually assures the "inevitable potential for conflict between administrative agencies" of which the Chief Justice warned. Such conflict and uncertainty could be eliminated only if the Departments of Education and Commerce deferred to the Commission's case-by-case interpretations—an unjustified reversal of roles that would frustrate Congress' specific intention to place sole enforcement responsibility with the funding agencies.[41]

b. *Interference with Implementation of the Commission's Own Policies.*

Requiring the Commission to enforce compliance with various statutes in the renewal process may also interfere with the Commission's ability to implement its own policies. In the present context, for example, while the Commission has chosen not to adjudicate compliance with Section 504 in the renewal process, it has hardly been oblivious to the needs of the hearing-impaired. The Commission has, on several occasions, encouraged licensees to develop programs and technologies to serve the hearing-

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[40] 655 F.2d at 310, FCC App. 25a. This Court noted in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), "We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear."

[41] The Attorney General has authority to coordinate enforcement of Section 504 among the various funding agencies. *See* Executive Order 12250, 45 Fed. Reg. 72,995 (1980). *See also* 46 Fed. Reg. 40, 686 (1981) (redesignating coordination guidelines) (to be codified at 28 C.F.R. Part 41). This coordinating function enables the Attorney General to prevent or resolve conflicts when two funding agencies differ over whether a recipient of funds from both agencies has complied with Section 504. But since he only has control over funding agencies, he has no power to control or supervise any actions taken by the FCC to enforce compliance with Section 504 in license renewal proceedings.

impaired,[42] and it has permitted and encouraged the use of part of the television spectrum to experiment with the provision of "closed captioning" of programs for persons with special decoding devices.[43]

In addition, the Commission has encouraged the development of teletext to provide many services that will benefit the hearing-impaired and the general public. Teletext services, like closed captioning, can be transmitted over the same channel as standard television signals and received with a special decoder. However, the variety of services available through teletext is almost unlimited; in addition to the capability of providing captioning for the hearing-impaired, it can be used to provide a wide range of visual information for the entire audience. The Commission has recently initiated a rulemaking proceeding aimed at authorizing television stations to provide teletext services.[44] (It is noteworthy that petitioner KCET has participated extensively (along with CBS) in efforts to develop a teletext service.) [45]

However, the Commission specifically decided not to *require* licensees to provide "open or closed captioning or any other form of special visual program material . . . ." [46] The Commission decided that "there were too many un-

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[42] *See e.g., Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F.C.C.2d 917 (1970); *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 F.C.C.2d 18 (1976), *recon. granted*, 62 F.C.C.2d 565 (1977); *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, 63 F.C.C.2d 378 (1976) (*"Captioning for the Deaf"*).

[43] *Captioning for the Deaf, supra.*

[44] *Proposed Authorization of Transmission Teletext by TV Stations*, 46 Fed. Reg. 60,851 (1981).

[45] *Id.* at 60,852, 60,854.

[46] 69 F.C.C.2d at 465, FCC App. 53a. *See Captioning for the Deaf, supra*, 63 F.C.C.2d at 388-89.

answered questions—technical and financial"[47]—with respect to the feasibility of various captioning methods. Open captioning is distracting and interferes with viewing by persons whose hearing is not impaired. Closed captioning is expensive, both for broadcasters and for hearing-impaired viewers and presents technical problems that may make alternative methods preferable. In fact, one of the Commission's concerns, even before the present proceeding, was that requiring and reserving spectrum space exclusively for closed-captioning "would possibly defer future technological developments, such as a teletext-type system, which would provide a larger number of services, including captioning, to a larger percentage of the public."[48] In addition, the Commission preferred to adhere to its general regulatory goal of allowing maximum licensee discretion in determining how best to serve the program needs of its viewers.[49]

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[47] 69 F.C.C.2d at 465, FCC App. 53a.

[48] 63 F.C.C.2d at 388.

[49] *See, e.g., Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 412 U.S. 94, 120 (1973); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979). Moreover, the Commission has identified particular difficulties that would arise if it attempted to implement the "national policy" supposedly embodied in Section 504. As the Commission pointed out, enforcement of Section 504 would create special problems. National policies aimed at eliminating race and sex discrimination

> "are premised on the notion that there is no inherent difference between the general public and members of the 'protected groups' . . . . Therefore, minorities and women should not be discriminated against. However, . . . the premise of Section 504 is that handicapped persons may require different treatment than others in order to receive equal access." *Amendment of Broadcast Equal Employment Opportunity Rules and Form 395*, Second Report and Order, Docket No. 21474, 76 F.C.C.2d 86, 95 (1980), *petition for review pending, California Ass'n of the Physically Handicapped, Inc. v. FCC*, Nos. 80-7157, 80-7482 (9th Cir.).

The captioning requirement that would be imposed by the court of appeals' decision is an example of the sort of "different treatment" that goes beyond simple elimination of discrimination.

The court of appeals' decision has effectively required the Commission to impose captioning requirements on public television stations even though other approaches, such as teletext, may ultimately be found by licensees to serve the hearing-impaired better. The court of appeals has thus frustrated the Commission's efforts to deal with the complex policy issues and technological developments in this area, at least with respect to noncommercial licensees.

Moreover, the court of appeals has required that these issues be addressed in the context of an individual license renewal proceeding, even though the Commission has determined that comprehensive rulemaking proceedings represent a far better approach to this problem. It is precisely this sort of interference with the discretion and judgment of the Commission with respect to regulation of broadcasters that Congress and this Court have sought to prevent. As this Court has often reaffirmed, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." [50]

c. *Burden of Requiring Commission Enforcement of Many Other Laws and Policies.*

Any requirement that the Commission apply national policy could not be limited to the single statute at issue in this case. If the Commission is required to enforce the requirements of Section 504 through the license renewal process, there are innumerable other laws and policies that could also have to be enforced or weighed by the Commission. For example, Section 601 of the Civil Rights Act of 1964 and Section 901 of the Education Amendments of 1972 establish race and sex discrimination prohibitions applicable to recipients of Federal financial

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[50] *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974). *See Viacom International, Inc. v. FCC*, No. 81-4119, slip op. at 14 (2d Cir. Feb. 9, 1982).

assistance that go beyond the Civil Rights Act provisions applicable to all persons.[51]

In each of these cases, the Commission could be required to develop standards and procedures for judging compliance with a statute whether or not it determined that the statutory requirements were related to its area of regulatory jurisdiction and competence, and even though enforcement responsibilities are already vested in the funding agencies. This would turn the license renewal process into an unmanageable forum for the adjudication of a plethora of national laws and policies with which the Commission is only remotely familiar. Diversion of Commission resources to these issues would hamper its efforts to deal with the regulatory tasks that Congress specifically assigned to it.

II. Even if the Commission Were Required to Incorporate Some "National Policies" into the Public Interest Standard, There Is No Ground for Requiring the Incorporation of Section 504.

Even if some "national policies" were required to be incorporated into the public interest standard, the court provided no standard for determining whether a statute embodies such a "national policy." It is apparent, in any event, that the requirements of Section 504 of the Rehabilitation Act do not rise to the level of national policy that overrides the Commission's broad discretion.

Section 504 does not impose obligations generally on all persons or institutions or even on all broadcasters. Section 504 applies only to recipients of federal funds, and the court of appeals has held that the "national policy" that it supposedly embodies affects only the Commission's consideration of noncommercial broadcasters. As the Commission has noted, Section 504 does not make

> "private discrimination against handicapped persons illegal as such . . . . Section 504 is almost identical

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[51] *See* FCC Brief, Part II B.

> to Section 601 of the Civil Rights Act of 1964 and Section 901 of the Education Amendments of 1972. All of these enactments, however, deal only with grantees of Federal financial assistance. Thus, even assuming that such Congressional enactments as exist constitute a 'national policy' in some form, the nature of that policy is not the same as the absolute prohibition against discrimination embodied in Title VII of the Civil Rights Act which first led us to enter the EEO area." [52]

Section 504 reflects a Congressional decision to impose, as a condition to federal funding, additional burdens and obligations that Congress has not been willing to impose, as "national policy," on all persons. Even if the Commission were required to incorporate certain national policies into its definition of the public interest, it cannot reasonably be said that a specific obligation that applies only to recipients of federal funds or other narrowly defined subgroups of broadcasters would be, for this purpose, such a "national policy."

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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[52] *Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*, Second Report and Order, Docket No. 21474, *supra*, 76 F.C.C.2d at 95.

Brief for the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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QUESTION PRESENTED

Whether the Federal Communications Commission, in a broadcast licensing proceeding concerning a public television station, must make an independent assessment of the station's compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, even though enforcement of that provision is committed to other federal agencies.*

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* The parties to the proceeding in the court of appeals were as follows: Sue Gottfried; Greater Los Angeles Council on Deafness, Inc.; Federal Communications Commission; American Broadcasting Companies; CBS, Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Company, Inc.; RKO General, Inc.; and Community Television of Southern California.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-298

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

No. 81-799

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a)[1] is reported at 655 F.2d 297. The decisions of the Federal Communications Commission (Pet. App. 47a-78a) are reported at 69 F.C.C.2d 451 and 72 F.C.C.2d 273.

[1] "Pet. App." refers to the appendix to the petition in No. 81-799.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981. A timely petition for rehearing was denied on July 8, 1981 (Pet. App. 43a-46a). The petition for a writ of certiorari in No. 81-298 was filed on August 14, 1981. The petition in No. 81-799 was filed, after an extension, on October 27, 1981. The petition in No. 81-799 was granted on January 11, 1982. On that same date, the petition in No. 81-298 was granted limited to Question Two presented in the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in Pet. App. 79a-90a.

STATEMENT

A. The Regulatory Context

This case concerns the allocation of responsibility for enforcing two separate statutes, both of which we describe briefly below. We also describe the relevant scheme of administrative regulation that has developed under each statute.

1. *The Communications Act of 1934*

Under the Communications Act of 1934, the Federal Communications Commission ("Commission") is given authority to grant and renew broadcast licenses when it finds that the public interest, convenience, and necessity will be served thereby. 47 U.S.C. 307 (a), (d), 308(a), 309(a), (d). Television stations must apply for renewal of their licenses every five

years,[2] and any "party in interest," including a member of the station's audience, may petition to deny the application. 47 U.S.C. 309(d)(1). If an application presents "a substantial and material question of fact," or if the Commission "for any reason" is unable to find that the public interest, convenience, and necessity would be served by granting the application, it shall conduct a "full hearing" at which the applicant generally bears the burden of proof. 47 U.S.C. 309(e).

The Communications Act contains no provision defining the duties of broadcasters toward handicapped persons or requiring the Commission to prescribe those duties. Nevertheless, for more than a decade, the Commission has attempted to encourage the development of technically and financially feasible means of making television accessible to the hearing impaired. In 1970, the Commission issued a Public Notice advising all licensees that television's capacity "to alert, assist and entertain persons with impaired hearing" should be utilized to the "fullest extent." *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F.C.C.2d 917 (1970). Toward that end, the Commission recommended that emergency announcements be made visually, as well as orally (*ibid.*). It also offered (*id.* at 918) the following suggestions:

> In respect to news programs—that visual bulletins of the matter under discussion be presented, that weather maps have descriptive phrases placed on them and that some segment of the

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[2] Section 307 of the Communications Act of 1934, 47 U.S.C. 307, as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 1241(a), 95 Stat. 736. Until last year, the maximum license term was three years. See 47 U.S.C. 307; see also *Station License Period*, 88 F.C.C.2d 355 (1981).

> screen be, as far as possible, continually reserved for the presentation of the face of the announcer so as to permit lip-reading. In respect to informational programs—that such programs be presented concerning the problems of the deaf and hard of hearing. * * * In respect to entertainment—that during sports programs the scoreboard be frequently flashed on the screen, that names of players or persons being pictured be presented in written form and that broadcasts of movies be made with subtitles when films are available with subtitles.

The Commission explained that its Public Notice was "advisory in nature," but warned (26 F.C.C.2d at 918-919) that it would monitor developments and would consider issuing rules establishing minimum requirements if broadcaster initiatives did not "develop satisfactorily." The Commission later adopted rules requiring that all emergency announcements be broadcast visually. *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 F.C.C.2d 18 (1976), modified on reconsideration, 62 F.C.C.2d 565 (1977) (codified at 47 C.F.R. 73.1250(f)).

In 1972, the Commission authorized the Public Broadcasting System (PBS) to begin an experimental program to assist hearing impaired persons. The experimental program was based on the use of "closed" captions in conjunction with television broadcasts. See *Television Broadcast Signal for Captioning for the Deaf*, 41 Fed. Reg. 5834 (1976). "Closed" captions are captions visible only on televisions equipped with special decoding devices. "Open" captions, by contrast, appear on all television screens like subtitles on foreign-language movies. The method selected by PBS was use of the vertical blanking space

of Line 21 of the television broadcast signal for transmitting "closed" captions. *Ibid.*

After several years of experimentation, PBS filed a Petition for Rulemaking requesting that Line 21 be reserved exclusively for closed captioning. See *Television Broadcast Signal for Captioning for the Deaf*, 41 Fed. Reg. 5834 (1976). The PBS proposal elicited comments from broadcasters, representatives of hearing impaired persons, electronics manufacturers, and others; those comments revealed pervasive disagreement about the best method for making television accessible to the aurally handicapped. See *Captioning for the Deaf*, 63 F.C.C.2d 378 (1976). One network asserted that adoption of the PBS proposal might preclude implementation of a potentially more versatile system known as "teletext" [3] then being tested in Great Britain (*id.* at 383). Some who submitted comments concluded that adoption of the PBS proposal might induce the widespread purchase of a generation of decoding devices that would soon be rendered technologicaly obsolete (*id.* at 387). All three commercial networks and the nation's leading manufacturer of motion picture film expressed the view that the proposed closed captioning system was incompatible with movies, a staple of television broadcasting (*id.* at 384). Moreover, estimates by PBS and the commercial networks of the costs of closed captioning varied dramatically (*id.* at 384-385). In addition, questions

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[3] Teletext, like the Line 21 system, transmits information in the vertical blanking interval of the standard television signal and requires decoding. However, "[t]eletext has the potential to serve a wide variety of applications" in addition to captioning, such as "weather reports, news, comparative shopping prices, and community bulletins." *Proposed Authorization of Transmission Teletext by TV Stations*, 46 Fed. Reg. 60851, 60852 (1981).

were raised concerning the number of persons for whom closed captioning was the least expensive method of providing access to television (*id.* at 386-387).

The Commission concluded that there were too many unanswered questions, both technical and financial, to justify adoption of the PBS proposal (63 F.C.C.2d at 388-389). The Commission therefore permitted broadcasters to employ the system tested by PBS but did not impose mandatory requirements (*id.* at 389). The Commission stated (*id.* at 388):

> On the one hand we believe it is of the utmost importance that the hearing-impaired, a significant portion of our population, enjoy the tremendously powerful television medium. The Commission attempted to make this clear in the 1970 Policy Statement * * *. On the other hand, we find many unanswered questions * * *. Regardless of how we look at it, there is simply no easy solution.[4]

Most recently, the Commission issued a notice proposing to authorize the use of "teletext," as well as the Line 21 captioning system. See *Proposed Authorization of Transmission Teletext by TV Stations*, 46 Fed. Reg. 60851 (1981). The Commission noted that "teletext" may be capable of "providing captioning services that are in many respects superior to those of the [Line 21] captioning system and also offers many new features with potential value for all television users" (*id.* at 60853). The Commission explained that (*id.* at 60851):

> In keeping with [our] responsibility to regulate use of the radio frequencies in accordance with

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[4] One of the most recent developments is an experimental system, called "Real Time," which may permit captioning of some types of live broadcasts.

> the public interest, we believe it is important to provide a regulatory environment that is conducive to the emergence and implementation of new technology * * *.

Thus, acting under the "public interest" standard of the Communications Act, the Commission has advised licensees that it expects them to make television accessible to the hearing impaired. It has facilitated experimentation in this field and has monitored developments.[5] The Commission nonetheless has concluded that, at present, technological and financial problems are such that it should rely on voluntary initiatives rather than mandatory requirements under the Communications Act except with respect to emergency announcements.[6]

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[5] Licensees generally have heeded the Commission's recommendations and have voluntarily scheduled a substantial amount of programming accessible to the hearing impaired. By February 1982, more than 30 hours of closed captioned programs were being broadcast during the average week by PBS, ABC, and NBC. CBS has not employed the Line 21 closed captioning system presently authorized because it believes that "teletext" is superior. See *Proposed Authorization of Transmission Teletext by TV Stations*, 46 Fed. Reg. 60851 (1981); *Captioning for the Deaf*, 63 F.C.C.2d 378, 383 (1976).

[6] The Commission's concern for the communications needs of the hearing impaired also is reflected in proceedings concerning other types of communications. In 1978 the Commission began an inquiry into expanding the use of teletypewriter systems in order to provide the deaf with a substitute for the telephone. *Telecommunication Services for the Deaf and Hearing-Impaired*, 67 F.C.C.2d 1602 (1978). Recently, the Commission concluded a rule making proceeding that reallocated two radio channels to provide paging services for the hearing impaired, blind, and physically handicapped. *Amendment of Part 90 of the Commission's Rules to Provide for Operation of Tactile Paging Devices for the Deaf, Blind and Physically Handicapped*, 84 F.C.C.2d 750 (1981).

2. *Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, provides in relevant part that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financing assistance * * *."[7]

Enforcement of these provisions of Section 504 has been committed to the federal agencies providing financial assistance. 28 C.F.R. 41.1-41.7.[8] Each such agency must establish a system of enforcement to ensure that programs and activities receiving its funds comply with Section 504. 28 C.F.R. 41.5. That system must prescribe "[t]he enforcement and hearing procedures that the agency has adopted for the enforcement of title VI of the Civil Rights Act of

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[7] In 1978, after the expiration of the 1974-1977 license term under review in this case, Section 504 was amended to prohibit discrimination against the handicapped, not only "under any program or activity receiving Federal financial assistance," but also "under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. (Supp. III) 794. This amendment has no bearing on the issues before the Court in the present case. Even if the Commission were deemed an "Executive agency" within the meaning of the amendment, programming of broadcasters licensed by the Commission is not a "program or activity conducted by" the Commission itself.

[8] Enforcement of Section 504 originally was committed to the funding agencies by Exec. Order No. 11,914, 45 C.F.R. Part 85 App. A, at 374, which required each such agency to issue rules, regulations, and directives implementing the statute. That Executive Order also empowered each agency to withhold assistance from programs or activities that failed to comply (*ibid.*).

1964." 28 C.F.R. 41.5(a). Each funding agency also must promulgate regulations implementing Section 504 with respect to those programs and activities to which it provides financial assistance. 28 C.F.R. 41.4.

The two principal federal agencies that provide financial assistance to television stations are the Departments of Education and Commerce. The Department of Education funds the production of educational television programs and makes them available to noncommercial educational stations at no cost or at a cost below their fair market value. See Pub. L. No. 97-35, Section 561, 95 Stat. 469 *et seq.* The Department of Commerce administers grants for the construction of educational broadcasting facilities. See 47 U.S.C. 390-394, amended by the Public Telecommunications Financing Act of 1978, Pub. L. No. 95-567, 92 Stat. 2405. Smaller subsidies are provided by other federal executive agencies, such as the National Endowments for the Arts and Humanities.[9]

Both the Departments of Education and Commerce have adopted regulations defining Section 504's requirements in general terms.[10] More important for

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[9] Noncommercial education stations also receive grants from the Corporation for Public Broadcasting, "a nonprofit corporation" that is "not * * * an agency or establishment of the United States Government." 47 U.S.C. 396(b). Because KCET, like other noncommercial educational television stations, receives financial assistance from federal executive departments and agencies as well as the Corporation for Public Broadcasting (see Pet. App. 17a-18a), this case does not present the question whether receipt of funds from the latter entity would by itself suffice to make Section 504 applicable. See 47 U.S.C. 398.

[10] The Department of Education's substantive Section 504 regulations are contained in 34 C.F.R. Part 104. The Department of Commerce has temporarily adopted (see 46 Fed. Reg. 37068-37069 (1981)) the Section 504 regulations originally

present purposes, both departments have established comprehensive procedures for enforcing Section 504. Each recipient of funds must submit periodic compliance reports,[11] and the departments must periodically review recipients' activities.[12] If an aggrieved person believes that an applicant or recipient has violated Section 504, he or she may file a written complaint with the relevant department, and a full investigation may be conducted.[13] If a violation is found and compliance cannot be achieved by informal means, the department may suspend, terminate, or refuse to

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issued by HEW. See 45 C.F.R. Part 84. The Department of Commerce also has issued its own proposed regulations implementing Section 504 (43 Fed. Reg. 53765-53767 (1978)). In addition, the National Telecommunications and Information Administration (NTIA), which administers the Department of Commerce facilities grants, has issued a regulation stating that "NTIA shall enforce Section 504 * * *." 15 C.F.R. 2301.28(d).

[11] Under 34 C.F.R. 104.61, the Department of Education's Title VI enforcement procedures (34 C.F.R. 100.6-100.10) apply to Section 504 as well. As previously noted (see footnote 10, *supra*), the Department of Commerce is temporarily operating under implementing regulations issued by HEW. 46 Fed. Reg. 37068-37069 (1981). Under these regulations (see 45 C.F.R. 84.61), HEW's Title VI procedures (45 C.F.R. 80.6-80.10) were made applicable to Section 504 proceedings. Under the Department of Commerce's proposed regulations implementing Section 504 (43 Fed. Reg. 53765-53767 (1978)), the Department's own Title VI procedures (15 C.F.R. 8.7-8.14) would apply. These three sets of Title VI procedures do not differ significantly.

[12] 34 C.F.R. 100.6(b); 45 C.F.R. 80.6(b). See 15 C.F.R. 8.7(b).

[13] 34 C.F.R. 100.7(a); 45 C.F.R. 80.7(a). See 15 C.F.R. 8.7(e).

grant funds.[14] The department also may attempt to effect compliance by any other means permitted by law, including referral of the case to the Department of Justice with a recommendation that proceedings be brought under any applicable federal law.[15]

In order to prevent conflicting interpretations and applications of Section 504, the Attorney General has been given the responsibility for coordinating the implementation of Section 504.[17] In consultation with the funding agencies, the Department of Justice is now in the process of preparing regulatory guidelines concerning what obligations Section 504 imposes on broadcasters and producers receiving federal financial assistance.[18]

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[14] 34 C.F.R. 100.7(b), (c); 45 C.F.R. 80.7(b), (c). See 15 C.F.R. 8.8(a), 8.10(a).

[15] 34 C.F.R. 100.7(d), 100.8(a); 45 C.F.R. 80.7(d), 80.8(a). See 15 C.F.R. 8.10(b), 8.11(a).

[16] 34 C.F.R. 100.8(a); 45 C.F.R. 80.8(a). See 15 C.F.R. 8.11(a).

[17] The responsibility for coordinating the implementation of Section 504 initially was given to the Secretary of Health, Education and Welfare ("HEW"). Exec. Order No. 11,914, 45 C.F.R. Part 85 App. A, at 374. In that capacity, HEW issued general guidelines. 45 C.F.R. Part 85, amended and redesignated as 28 C.F.R. Part 41 in 46 Fed. Reg. 40686-40687 (1981). By Exec. Order No. 12,250, 45 Fed. Reg. 72995 (1980), HEW's responsibility was transferred to the Attorney General, but the general guidelines previously issued by HEW were retained.

[18] Those regulations will be included in new and expanded coordinating regulations that will replace those previously issued by HEW. In January 1982, draft regulations were circulated to the affected agencies for comment.

B. Proceedings Below

1. *Proceedings Before the Commission*

Respondents petitioned the Federal Communications Commission to deny the 1977 license renewal applications of one noncommercial and seven commercial television stations in the Los Angeles area. The petitions charged, among other things, that the stations had failed to meet their "public interest" obligations under the Communications Act and had violated Section 504 of the Rehabilitation Act during the 1974-1977 license term under review by failing to offer sufficient programming understandable to hearing impaired persons. See Pet. App. 47a-49a.[19]

The Commission denied the petitions without conducting an evidentiary hearing (Pet. App. 47a-62a). After summarizing its continuing efforts to make television accessible to the hearing impaired (Pet. App. 51a-53a), the Commission explained that it had not imposed mandatory programming requirements upon licensees (*id.* at 53a). The Commission therefore rejected respondents' claim that the licensees had failed to meet their "public interest" obligations (*id.* at 57a-59a). The Commission also concluded that Section 504 of the Rehabilitation Act provided no basis for denying renewal of the stations' licenses (Pet. App. 59a-60a).

The Commission held that the seven commercial stations were not subject to Section 504 because they did not receive federal financial assistance (Pet. App.

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[19] The petitions also argued that the stations had failed to comply with the Commission's requirement that all licensees "ascertain" the problems, needs, and interests of the communities they serve (see Pet. App. 48a). The Commission's rejection of that claim (*id.* at 54a-56a) was not disturbed by the court of appeals and is not at issue here.

59a-60a). By contrast, the Commission observed that the noncommercial station, KCET, "might fall within the purview" of the statute since it received federal funds (*id.* at 60a). In accordance with its longstanding policy concerning law violations by licensees, the Commission stated that it would take into consideration any violations of Section 504 found by "the proper governmental agency to consider such matters," but it declined to make an independent assessment of KCET's compliance with Section 504 (*ibid.*).

The Commission subsequently denied respondents' petition for reconsideration (Pet. App. 63a-78a). It noted (*id.* at 71a) that respondents' attorney had filed a complaint with the Department of Health, Education, and Welfare alleging that KCET had failed to comply with Section 504,[20] and it reiterated that it would take into consideration any violation of Section 504 found by an appropriate agency (*id.* at 71a). The Commission also observed (*id.* at 76a-77a) that broadcasters' voluntary efforts to provide programming for the hearing impaired appeared promising, but it added that if those efforts were not "successful in making television programming more available and enjoyable to the hearing impaired, then it [might] be necessary for the Commission to determine if a rulemaking is warranted to ensure that the hearing impaired are not deprived of the benefits of television" (*id.* at 77a).

2. *The Decision of The Court of Appeals*

A divided panel of the United States Court of Appeals for the District of Columbia Circuit vacated the

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[20] Respondents subsequently filed a similar complaint against KCET with the Department of Commerce. The complaint originally filed with HEW was recently decided in KCET's favor by the Department of Education. The complaint filed with the Department of Commerce is still pending.

Commission's denial of the petition concerning KCET (Pet. App. 1a-42a). In an opinion by Judge Wright, the majority held that KCET was bound by Section 504 because it received substantial federal grants. Noting that the "FCC is directed to renew broadcast licenses only if it finds that renewal would serve the 'public interest, convenience, and necessity' " (*id.* at 19a), the majority held that "the FCC's 'public interest' mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under Section 504 * * *" (*id.* at 20a).

The majority summarily rejected (Pet. App. 26a) the Commission's contention that it would have no basis for assessing compliance with Section 504 until the funding agencies articulated standards for broadcasters under that provision. The majority recognized that other agencies were "primarily responsible" for enforcing Section 504, and that a lawsuit was pending in which the court had ordered one of those agencies to issue a Section 504 compliance standard with respect to public broadcasters (*id.* at 18a, 8a-9a & n.22).[21] The majority also acknowledged that "it is

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[21] Respondents filed suit in the United States District Court for the Central District of California against Community Television of Southern California (the licensee of KCET-TV), related public broadcasting entities, and various federal agencies, including the FCC. *Greater Los Angeles Council on Deafness (GLAD) v. Community Television of Southern California (KCET)*, No. CV 78-4715-R (C.D. Cal. Nov. 17, 1981). Respondents alleged that the broadcasters had violated Section 504 by failing to caption their programs and that the federal agencies had failed to enforce Section 504 with respect to public broadcasters. The district court first dismissed the claim against the broadcasters, finding that they had not been shown to have violated Section 504. In November 1981, it

not the function of the FCC to adjudicate law violations, or, indeed, to regard itself as bound strictly by the specific dictates of the Rehabilitation Act" (*id* at 26a). Nonetheless, the court concluded that the Commission is obligated "to effectuate the underlying national policy" expressed in Section 504 (*ibid.*). The court added (*id.* at 18a) that the Commission must endeavor to "define the station's responsibilities under the Rehabilitation Act and to enforce the Act's policies in license renewal proceedings."

The majority similarly rejected the Commission's contention that it would be unfair to judge KCET's programming during the past license term by reference to the as yet undefined requirements of Section 504 in the field of broadcasting (Pet. App. 27a). The majority believed (*ibid.*) that license renewal proceedings should focus upon "the station's willing-

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issued an order requiring the FCC and the Departments of Education, Justice, and Health and Human Services to adopt Section 504 compliance standards for public broadcasters. While apparently adopting respondents' theory that only open captioning will satisfy the requirements of Section 504, the court also enjoined the funding agencies from distributing monies to producers unless full compliance with Section 504 is assured either by contract or regulation. The district court's order was stayed by the court of appeals pending appeal. *Greater Los Angeles Council on Deafness* v. *Bell*, No. 81-5952 (9th Cir.).

Respondents also have filed administrative complaints against KCET with the Departments of Education and Commerce (see page 13 note 20, *supra*). In February 1982, the Department of Education issued a decision finding that KCET had complied with Section 504. The Department concluded that Section 504 does not require open captioning, as respondents maintain, and does not forbid KCET's practice of transmitting educational programs supplied by the Department in the form in which they are received, whether with or without closed captions.

ness—as measured against its capacity and its viewers' need—to provide programming for the aurally handicapped." Accordingly, the court remanded the case and directed the Commission "to inquire at least into the station's good faith, as manifest in its efforts to provide service in accord with the legislative policy goals of Section 504" (*ibid.*). In view of perceived delays in implementing Section 504 (Pet. App. 9a n.22, 26a-27a), the court admonished that the Commission "must therefore proceed immediately" (*id.* at 27a) and "accept its duty now" (*id.* at 29a).

The court reached a different result with respect to the seven commercial broadcasting stations. Rejecting the argument that broadcast licenses constitute "Federal financial assistance" within the meaning of Section 504, the court unanimously held (Pet. App. 29a-35a, 40a) that the commercial stations lacked "specific obligations" under that provision. Acknowledging the efforts the Commission had made to encourage its licensees to make television accessible to the hearing impaired, and "[r]ecognizing that the Commission possesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace," the court deferred to the Commission's determination of what was required from those stations under the public interest standard (*id.* at 37a-38a). At the same time, the court warned (*id.* at 38a) that "judicial action might become appropriate at a later date."

Judge McGowan dissented from the court's decision concerning KCET. Noting that the Department of Education had been assigned the responsibility for developing compliance standards for Section 504 in the field of television programming and that the Commission stood "ready to take [those standards] fully

into account in subsequent license renewal proceedings," he concluded (Pet. App. 40a-42a) that public television stations should not be required to undergo "the expense and uncertainty of renewal hearings" in the interim.

The Commission, Community Television of Southern California, and respondents all petitioned for a writ of certiorari. The Commission's petition (No. 81-799) was granted, and that of Community Television of Southern California (No. 81-298) was granted Limited to Question Two presented in the petition. Respondents' petition was denied (J.A. 189a-190a).

SUMMARY OF ARGUMENT

I.

This case concerns the proper method of enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, which prohibits discrimination against the handicapped in any program or activity that receives federal financial assistance. The court of appeals concluded that Section 504 applies to public television stations receiving such aid and requires efforts to make television programs understandable to the hearing impaired. The court of appeals further concluded that, under the existing enforcement scheme, Section 504 has not been implemented with sufficient promptness. In order to remedy that perceived deficiency, the court of appeals devised a new enforcement mechanism. In the court's view, the Federal Communications Commission must make an independent assessment of a public television station's compliance with Section 504 when determining whether to grant renewal of the station's broadcast license. The court expressed the belief that the "national policy" contained in Section 504 should be superimposed upon the "public interest" standard under

which the Commission evaluates license renewal applications.

A. In reaching the result that it did, the court of appeals failed to make any attempt to determine whether Congress intended the Commission to adjudicate complaints alleging violations of Section 504. An examination of the literal language used by Congress and the legislative history clearly shows that Congress intended that federal agencies providing financial assistance would be responsible for enforcement of Section 504, not licensing agencies like the Commission. Section 504 was patterned upon two earlier antidiscrimination statutes: Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). Congress expressly provided that the funding agencies would enforce those laws, and the legislative history of Section 504 makes it clear that Congress intended that provision to be enforced in the same manner. This conclusion is reinforced by the literal language of Section 504, which focuses on federal funding as the pivotal event that triggers the antidiscrimination requirement.

B. Beyond this, Congress contemplated that Section 504 would be enforced through the exercise of specific remedial powers—powers that are not possessed by the Commission. The remedies intended by Congress under Section 504 were termination of federal funding and injunctive relief. There is no suggestion in the text of the statute or its legislative history that Congress believed that the weighty sanction of denial of a broadcast license was an appropriate remedy for a violation of Section 504.

C. The decision rendered by the court of appeals also is unsupported by practical considerations. Duplicative enforcement of Section 504 by the Commis-

sion is not necessary to achieve the statute's purposes. Comprehensive administrative procedures for enforcing Section 504 have been established by the funding agencies and are currently in operation. In addition, a private right of action under Section 504 has been widely recognized by the courts of appeals. Respondents themselves have made full use of these available methods of enforcement.

II.

Compelling the Commission to enforce Section 504 in broadcast license proceedings would clash with the provisions and policies of the Communications Act. The court of appeals believed that its newly fashioned enforcement mechanism could be erected on the basis of the "public interest" standard contained in the Communications Act. However, as the expert body charged with the task of regulating broadcasting under the Communications Act, the Commission is entitled to implement its view of the public interest and is not constrained by the policy views of the court of appeals.

A. The Commission has developed a comprehensive approach to the problem of making television accessible to the hearing impaired. It has concluded that, at present, technological progress can best be stimulated by facilitating and encouraging experimentation and diverse voluntary efforts rather than by imposing mandatory requirements. While this approach has achieved significant results, the Commission has warned that mandatory requirements may be imposed if voluntary efforts are not satisfactory. And it has emphasized that it will consider violations of Section 504, as adjudicated by funding agencies and other appropriate governmental bodies, when rendering its decisions in broadcast license proceedings.

The Commission's expert judgment concerning the proper construction of the "public interest" standard should not have been disturbed by the court of appeals.

B. It is difficult to place limits on the rationale utilized by the court of appeals when it imposed new enforcement responsibilities on the Commission under the guise of construing the "public interest" standard. The "policies" of many federal statutes could be superimposed on the public interest standard in the same manner. The public interest standard would quickly lose its flexibility if it were expanded in this impractical and unjustified way. As this Court stressed in *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976), "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation."

III.

Finally, requiring the Commission to enforce Section 504 in licensing proceedings would produce adverse practical consequences. It would place a heavy and unnecessary administrative burden on both the Commission and broadcasters. And it would create a serious potential for conflicting administrative pronouncements. As the Chief Justice observed in his concurring opinion in *NAACP* v. *FPC*, *supra*, 425 U.S. at 674 (emphasis in original): "[t]o the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly."

ARGUMENT

I. CONGRESS DID NOT INTEND THE FEDERAL COMMUNICATIONS COMMISSION TO ADJUDICATE VIOLATIONS OF SECTION 504 OF THE REHABILITATION ACT

A. Congress Intended That Section 504 Would Be Enforced By Agencies Providing Federal Financial Assistance

The court of appeals held that the Federal Communications Commission must make an independent assessment of its licensees' compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, but the court failed to cite any evidence that Congress intended such a result. In fact, it is abundantly clear that Congress intended that Section 504 would be enforced by the agencies providing federal financial assistance and not by licensing agencies like the FCC.

Section 504 prohibits discrimination "solely by reason of * * * handicap" under "any program or activity receiving Federal financial assistance." Section 504 was patterned after two earlier enactments prohibiting other forms of discrimination, both of which employ language virtually identical to that contained in Section 504. Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d ("Title VI"), forbids discrimination "on the ground of race, color, or national origin" under "any program or activity receiving Federal financial assistance." Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) ("Title IX"), prohibits discrimination "on the basis of sex" under "any education program or activity receiving Federal financial assistance."

Congress expressly provided that Title VI and Title IX would be enforced by those agencies respon-

sible for distributing federal aid. 42 U.S.C. 2000d-1 requires "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity * * *" to "effectuate the provisions of section 2000d * * * with respect to such program or activity by issuing rules, regulations, or orders of general applicability * * *." In addition, 42 U.S.C. 2000d-1 empowers agencies to employ a number of specific sanctions, including the withholding or termination of funds, in order to obtain compliance with the implementing regulations. That statute also prescribes the procedures agencies must follow before imposing such sanctions. In 20 U.S.C. 1682, Congress provided for the enforcement of Title IX in almost identical terms.

Although the Rehabilitation Act lacks a provision analogous to 42 U.S.C. 2000d-1 or 20 U.S.C. 1682, Congress clearly intended that Section 504 would be enforced in a similar manner. The detailed enforcement machinery of Title VI already was in place when Section 504 was enacted. That same enforcement scheme had been adopted for enforcement of Title IX one year earlier. See 20 U.S.C. 1682. The committee reports accompanying the 1974 amendments to the Rehabilitation Act leave no doubt that Congress intended the same enforcement procedures to apply under Section 504. The Senate report concerning the 1974 amendments to the Act stated (S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974)):

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, [20] U.S.C. 168[1] (relating to sex). * * * It does not specifically re-

> quire the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.
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> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts * * *. This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

Substantially identical language appeared in the House conference report (H.R. Conf. Rep. No. 93-1457, 93d Cong., 2d Sess. 27 (1974)) and an earlier Senate report (S. Rep. No. 93-1139, 93d Cong., 2d Sess. 24 (1974)).[22] See generally *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-698 (1979) (because Title IX was patterned after Title VI it should be presumed that a similar method of enforcement was intended).

In accordance with Congress' intent, a parallel enforcement scheme was implemented under Section 504. By Executive Order in 1976, the President designated the Department of Health, Education, and Welfare ("HEW") as the agency responsible for coordinating the implementation of Section 504. Exec. Order No. 11,914, 45 C.F.R. Part 85 App. A,

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[22] See also 120 Cong. Rec. 30551 (1974) (remarks of Sen. Stafford); 120 Cong. Rec. 35972 (1974) (remarks of Rep. Vanik).

at 374.[23] The Executive Order specifically required the Secretary of HEW to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." *Ibid.* The Order further provided that "[i]n order to implement the provisions of section 504, each Federal department and agency *empowered to provide Federal financial assistance* shall issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education, and Welfare" (emphasis added). In 1978, HEW issued regulations again directing each such department or agency to "issue * * * a regulation to implement section 504 with respect to the programs and activities to which it provides assistance." 45 C.F.R. 85.4(a), now 28 C.F.R. 41.4(a). HEW's regulations also contained general guidelines defining discriminatory practices. 45 C.F.R. 85.51-85.58, now 28 C.F.R. 41.51-41.58.

This scheme of enforcement was approved by Congress in enacting the 1978 amendments to the Rehabilitation Act. Pub. L. No. 95-602, 92 Stat. 2982. As part of those amendments, Congress passed 29 U.S.C. (Supp. III) 794a(a)(2), which provides that persons aggrieved by violations of Section 504 shall have the benefit of the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act

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[23] Exec. Order No. 11,914 was revoked and replaced by Exec. Order No. 12,250, 45 Fed. Reg. 72995 (1980), which transferred the coordination and enforcement authority for Section 504 from HEW to the Department of Justice. The regulations adopted by HEW pursuant to that executive order remain in effect pending the adoption of new regulations by the Department of Justice. 45 Fed. Reg. 72997 (1980). The HEW regulations, 45 C.F.R. Part 85, were recently recodified at 28 C.F.R. Part 41. 46 Fed. Reg. 40686-40687 (1981).

of 1964 [42 U.S.C. 2000d *et seq.*]." Chief among those remedies is the withholding of financial assistance based upon a determination by the funding agency that its regulations have been violated. See 42 U.S.C. 2000d-1. Thus, 29 U.S.C. (Supp. III) 794a(a)(2) was clearly predicated upon the assumption that each funding agency would issue regulations under Section 504 and adjudicate claimed violations of that provision, just as they did under the prior laws that served as models for Section 504. The Senate report accompanying the 1978 amendments makes this clear. See S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978) (emphasis added):

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. *Thus, this amendment codifies existing practice as a specific statutory requirement.*

In sum, Congress clearly intended that Section 504 would be enforced by the agencies providing federal financial assistance. There is nothing in the Rehabilitation Act itself, and not a single word in its legislative history, to suggest that Congress contemplated that agencies such as the FCC, which provide no federal aid, would adjudicate complaints under Section 504. On the contrary, it is apparent that direct enforcement by the FCC and other federal licensing agencies would be contrary to Congress' intent.

B. Congress Did Not Intend That Section 504 Would Be Enforced By Agencies That Issue Licenses But Do Not Provide Federal Aid

Section 504, like the provisions upon which it was patterned, applies to only those private programs and activities "receiving Federal financial assistance."

Congress did not prohibit all discrimination against the handicapped, however desirable that goal may be. Congress did not exercise its power to regulate interstate commerce, or any other broad regulatory power. Rather, the constitutional authority supporting Section 504, as well as Title VI and Title IX, was Congress' authority to spend federal funds.[24] Congress can, of course, impose specific conditions on those who voluntarily receive federal financial assistance. See generally *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937).

When conditions attached to the receipt of federal aid are violated, two forms of relief are generally appropriate: termination of the aid by the funding agencies or enforcement of the conditions. Discussing Title VI and Title IX—Section 504's statutory models—this Court wrote in *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 704-705 (footnotes omitted):

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. * * *
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> The first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged

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[24] See 117 Cong. Rec. 39252 (1971) (remarks of Rep. Mink concerning Title IX); 110 Cong. Rec. 2468 (1964) (remarks of Rep. Celler concerning Title VI); 110 Cong. Rec. 6544 (1964) (remarks of Sen. Humphrey concerning Title VI).

> in discriminatory practices. That remedy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred. In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded.

The Court added (441 U.S. at 705 n.38): "Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort, all else —including 'lawsuits'—failing." Thus, remedies of even greater severity—such as the denial of a license essential for engaging in a particular business—were not adopted by Congress. As an illustration of Congress' limited intent, this Court quoted (*id.* at 704 n.36) Representative Mink's remarks concerning Title IX (117 Cong. Rec. 39252 (1971)):

> Any college or university which has [a] * * * policy which discriminates against women applicants * * * is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

Congress contemplated the same enforcement mechanism under Section 504. Private programs and activities that failed to comply with the statute were not to be driven out of existence; rather, they were to be denied federal aid.

The Federal Communications Commission does not provide federal financial assistance to its licenses and

therefore cannot attempt to enforce Section 504 by terminating federal aid. The Commission also lacks power to enjoin discriminatory conduct. The Commission's power to influence the conduct of its licensees derives from its authority to grant or deny broadcast licenses, but such licenses do not constitute "Federal financial assistance" within the meaning of Section 504.[25] Congress has regulated broadcasting under its commerce clause power (see 47 U.S.C. 301), not under its power to spend federal funds. Accordingly, the Commission is not equipped with the specific remedial powers that Congress believed should be utilized to achieve compliance with Section 504.

Enforcement of Section 504 in licensing proceedings also would be inconsistent with specific provisions governing the enforcement of that statute by the funding agencies. Those enforcement provisions, which are contained in regulations patterned after Section 504's statutory models, carefully limit and qualify the power of funding agencies to withhold financial aid. A funding agency, for example, may withhold funds only after filing with the Congressional committees having legislative jurisdiction over the program involved "a full written report of the circumstances and the grounds for such action."[26] The Commission need not file any such report before denying a license. Similarly, if a funding agency decides to withhold funds, its action must be limited in its effect to the particular program, or

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[25] See Pet. App. 29a-35a. See also our Brief in Opposition to Petition, No. 81-651, cert. denied (Jan. 11, 1982).

[26] 34 C.F.R. 100.8(c); 45 C.F.R. 80.8(d). Cf. 20 U.S.C. 1682; 42 U.S.C. 2000d-1.

part thereof, in which such noncompliance has been so found." [27] That provision illustrates Congress' intent that the penalty imposed by an agency for violating Section 504 must be tied closely to the event triggering Section 504's application: the receipt of federal funds. The Commission, however, cannot limit the denial of a license to only one portion of a station's activities.

In sum, it is apparent from the language of Section 504, the constitutional authority under which it was enacted, and the relevant legislative history, that direct enforcement of Section 504 in licensing proceedings is contrary to Congress' intent.

C. Effective Means of Enforcing Section 504 Already Are Available and Duplicative Enforcement By the Commission is Unwarranted

There might be some practical justification for the court of appeals' decision if Section 504 would otherwise go unenforced, but that is far from the case. First, the Departments of Education and Commerce, the two chief providers of federal financial assistance to broadcasters, have adopted procedures for receiving and resolving complaints of noncompliance with Section 504.[28] Indeed, just such a complaint concerning KCET's programming was lodged by respondents with the Department of Education and recently was resolved. As that administrative action illustrates, the Department stands ready to review the programming of stations receiving its assistance

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[27] 34 C.F.R. 100.8(c); 45 C.F.R. 80.8(d). Cf. 20 U.S.C. 1682; 42 U.S.C. 2000d-1.

[28] See pages 9-11, *supra*.

to determine whether the needs of the hearing impaired have been met as required by Section 504. Programs or activities found to have violated Section 504 face substantial sanctions, including the withholding of federal funds. 34 C.F.R. 100.10(f); 45 C.F.R. 80.10(f), 84.61; 46 Fed. Reg. 37068-37069 (1981).

Second, the Department of Justice, the agency now responsible for coordinating implementation of Section 504, is presently preparing regulatory guidelines concerning what obligations Section 504 imposes on broadcasters and producers receiving federal financial assistance. Those regulations, when promulgated, will help to ensure uniform enforcement of Section 504 by the funding agencies with respect to all public television stations. Third, a private cause of action under Section 504 has been recognized by all eight circuits that have addressed the question.[29] Respond-

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[29] *Pushkin* v. *Regents of the University of Colorado*, 658 F.2d 1372, 1380 (10th Cir. 1981); *Kling* v. *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980); *Baker* v. *Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980); *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 1229-1230 (7th Cir. 1980) (private right of action at least until relevant implementing regulations are issued); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247, 1258-1259 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); *Leary* v. *Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413, 415 (8th Cir. 1977).

This Court has not decided the question. See *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 31 (1981) (remanding for consideration of Section 504 issues); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981) (issuance of preliminary

ents themselves brought suit under Section 504 against KCET, and various federal agencies.[30] Because these alternative methods of enforcing Section 504 are available and fully adequate, the decision of the court of appeals requiring enforcement by the Commission serves no practical purpose.

Respondents maintained below that enforcement by the FCC is necessary because other federal agencies have been derelict in discharging their enforcement responsibilities. Even if that complaint were justified, it would provide no basis for the court of appeals' decision. There is no precedent for the proposition that a court may transfer the responsibility for enforcing a statute from one agency to another if it believes that the agency to which Congress committed that responsibility has failed to perform the duties assigned by statute.

Moreover, charges of undue delay in defining the requirements of Section 504 in this area do not ade-

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injunction in private action under Section 504 moot); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404 n.5 (1979) (issue not decided). But see *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-698 (1979) (private right of action under Title IX of Education Amendments of 1972 presumed because patterned after Title VI of Civil Rights Act of 1964). See also S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974); S. Rep. No. 93-1139, 93d Cong., 2d Sess. 25 (1974); H.R. Conf. Rep. No. 93-1457, 93d Cong., 2d Sess. 27 (1974).

[30] Suits against funding agencies for nonenforcement also have been recognized. See, *e.g.*, *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); *Paralyzed Veterans of America* v. *Smith*, No. 79-1979 WPG (C.D. Cal. June 17, 1981); *Cherry* v. *Mathews*, 419 F.Supp. 922 (D.D.C. 1976).

quately take account of the complexity of the problem of adapting television to serve the needs of the deaf. Among other things, a satisfactory solution must provide communication in a manner understandable to most hearing-impaired persons; it must not impose prohibitive costs upon hearing-impaired viewers; it must not interfere unduly with viewing by those without hearing impairments; it must not place unreasonable restrictions upon the journalistic and artistic freedom of television broadcasters and producers; and it must not impose such high costs on public television stations that they are driven out of business or forced to curtail other important services. In the face of problems of this magnitude, the government's inability to develop complete solutions on an immediate basis is perfectly understandable.

II. COMPELLING THE FCC TO DETERMINE WHETHER BROADCASTERS HAVE COMPLIED WITH SECTION 504 WOULD BE INCONSISTENT WITH THE PROVISIONS AND POLICIES OF THE COMMUNICATIONS ACT OF 1934

The decisions of this Court have clearly delineated the respective roles of administrative agencies and reviewing courts, both as a general matter and with particular reference to the Federal Communications Commission. Agencies are charged with the duty to assess relevant factual and policy considerations and to "weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" [31] An agency may render its judgment

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[31] *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). The agency's function is "not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert

based on predictions and accumulated experience in the industry. A " 'forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978).

By contrast, the function of the reviewing court is limited. That function is exhausted once it is determined that the agency's decision is rationally based on relevant factors. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion * * *" (*FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946)), particularly when the agency's decision is based on its analysis of public policy, which is "entitled to the greatest amount of weight by appellate courts" (*SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947)).

The Communications Act of 1934 requires the Commission to exercise its administrative authority in a manner that serves the "public interest, convenience, and necessity." 47 U.S.C. 301, 303, 309(a), 310(d). Just last term in *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 593 (1981), this Court reiterated that the public interest standard is a " 'supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.' " *Id.* at 593, quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Court added that the Commission must be given "broad dis-

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judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

cretion" in determining how best to achieve the goal of securing the maximum benefits of broadcasting for all the people and that the Commission is permitted "to implement its view of the public-interest standard * * * 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.'" 450 U.S. at 594, quoting *FCC* v. *National Citizens Committee for Broadcasting, supra*, 436 U.S. at 793. See also *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943).

In this case, the court of appeals turned aside the Commission's discretionary judgment concerning the proper construction of the public interest standard. Based upon its own view of what constitutes the public interest, the court of appeals required the FCC to incorporate into its public interest analysis an inquiry into the compliance of public broadcasting stations with Section 504. The court of appeals' approach is inconsistent both with the Communications Act itself and with this Court's decisions interpreting that Act.

A. The Commission's Expert Judgment Concerning The Best Means of Making Television Accessible To The Hearing Impaired Under the Communications Act Should Have Been Sustained

Consistent with its mandate under the Communications Act to "generally encourage the larger and more effective use of radio in the public interest," 47 U.S.C. 303(g), the Commission turned to the problem of making television accessible to the hearing impaired even before the Rehabilitation Act was enacted. The Commission's approach to the problem has three major components. First, the Commission has required visual transmission of all emergency announcements (47 C.F.R. 73.1250(f)). Second, it has encouraged and facilitated experiments and di-

verse voluntary efforts by broadcasters.[22] At the same time, it has warned that mandatory requirements may be imposed if voluntary efforts are not satisfactory, but it has not yet established such requirements (see Pet. App. 77a). Third, it has stated that, in deciding whether to grant or renew a license, it will take into account any violations of Section 504 found by the funding agencies responsible for enforcing that provision (*id.* at 60a, 71a).

The Commission's approach was developed over more than a decade, during which it acted to facilitate the development of feasible means to adapt television to the needs of the deaf. Its approach was based upon an appreciation of the difficult technical and economic problems involved and took into account, not only the legitimate needs of the hearing impaired, but the many other public needs that broadcasting must serve. The court of appeals should not have rejected the Commission's considered judgment based upon the court's view of what the public interest demands.

In order to demonstrate the soundness of the Commission's judgment—and the unwarranted nature of the court of appeals' intrusion—we will discuss below each component of the Commission's approach.

1. The oldest and simplest component of the Commission's strategy is the requirement that emergency announcements be transmitted so as to appear in visual form on all television sets. See *The Use of Telecasts to Inform and Alert Viewers with Impaired*

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[22] See Pet. App. 52a, 60a-61a, 77a; *Captioning for the Deaf, supra*, 63 F.C.C.2d at 388; *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing, supra*, 26 F.C.C.2d at 918. See also *Proposed Authorization of Transmission Teletext by TV Stations*, 46 Fed. Reg. 60851 (1981).

Hearing, 26 F.C.C.2d 917 (1970); *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 F.C.C.2d 18 (1976), modified on reconsideration, 62 F.C.C.2d 565 (1977). See 47 C.F.R. 73.1250(f) (Pet. App. 51a-53a). In this area, balancing the competing interests was easy. The importance of the information conveyed outweighs all other considerations.

2. Making television generally accessible to the hearing impaired, however, is a much more difficult and complicated problem. It is, first of all, a problem of considerable technical complexity. When the Commission first turned to this problem more than a decade ago, most of the technology now available had not yet been developed. It was largely through the combined efforts of the Commission, broadcasters, electronics manufacturers, and other government agencies that today's technology was devised and tested (see pages 3-7, *supra*). And, if progress continues, the present generation of technology may soon be rendered obsolete.[33]

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[33] The Commission has learned from early experience that moving too quickly in areas of developing technology can lead ultimately to confusion, delay, and unnecessary expense to the public. In 1940, for example, the Commission first authorized FM radio broadcasting in a portion of the radio spectrum. *Report on Frequency Modulation*, 39 F.C.C. 29 (1940). Five years later, after broadcasters had invested in transmitting equipment and listeners had purchased some 400,000 FM receivers, the Commission determined that FM radio broadcasting should be moved to a different part of the radio spectrum. *Nongovernment Frequency Allocations*, 39 F.C.C. 68, 116-121 and 39 F.C.C. 222, 225-226 (1945). Similarly, in the early 1950s, the Commission authorized one technology for the transmission of color television broadcasts only to select a different technology three years later after the first action had been affirmed by this Court. See *Color TV First Report*,

The Commission's expert judgment has been that technological progress may best be stimulated by facilitating and encouraging experimentation and diverse voluntary efforts by broadcasters rather than by imposing mandatory requirements, at least in the absence of further guidance from government bodies responsible for directly enforcing Section 504.[34] While the Commission has chosen to rely for the time being primarily upon the voluntary efforts of broadcasters and manufacturers, it also has made it clear that it will consider rulemaking should voluntary efforts fall short (see Pet. App. 71a). By announcing its intentions in this manner, the Commission has sought to provide an incentive for private initiative and experimentation.

The Commission's reliance upon encouraging and facilitating voluntary efforts has achieved noteworthy results. As a result of experiments initially conducted by PBS, funded by the Department of Health, Education, and Welfare, and authorized by the Commission, much closed captioned programming is now broadcast by PBS and the two commercial networks. By February 1982, more than 30 hours of such programming was broadcast during the average week,[35] and the necessary decoding devices were being sold at retail for a price comparable to that of many

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41 F.C.C. 1 (1950), *Color TV Second Report*, 41 F.C.C. 111 (1950), aff'd, *Radio Corp. of America* v. *United States*, 95 F.Supp. 660 (N.D. Ill. 1950), aff'd, 341 U.S. 412 (1951); *Color TV Transmissions*, 41 F.C.C. 658 (1953).

[34] While the Commission has not imposed mandatory requirements under the public interest standard of the Communications Act, that does not mean that such requirements may not be properly imposed by funding agencies under the Rehabilitation Act. As we have noted, those two statutes differ in their purpose, reach, and means of enforcement.

[35] See note 5, *supra*.

other home entertainment appliances.[36] When those programs are added to the few programs broadcast with open captions and the many television shows, such as telecasts of sports events, which may be enjoyed without the audio portion of the broadcast, it is apparent that television already is accessible to the hearing impaired to a considerable degree.

Efforts to make television accessible to the hearing impaired must take account of economic factors. Captioning may be very expensive for an individual television station,[37] and imposing special obligations upon public television stations, as did the court below, complicates the problem. Public television stations, which cannot sell advertising, are generally less able to bear the extra costs of captioning than their more prosperous commercial competitors. In addition, noncommercial television stations serve the public in large part by airing programs of specialized interest that lack the mass appeal required for broadcast on network affiliates. The extra cost of captioning may make such typically low-budget broadcasts impractical.

The court of appeals, for reasons that it left largely unexplained, ignored the Commission's assessment of these factors under the Communications Act and charted a course of its own.

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[36] A separate decoding device that can be attached to a regular television set is sold at cost by Sears Roebuck & Co. for $289.95. *Sears Spring/Summer 1982 Catalog* 749 (1982). Sears also sells a color television set with a built-in decoder for $160 more than the price of the same set without the device. The Internal Revenue Service has ruled that such devices qualify as itemized medical deductions when purchased by hearing-impaired persons. Rev. Rul. 80-340, 1980-2 Cum. Bull. 81.

[37] The National Captioning Institute charges approximately $2500 per hour of programming.

3. The final component of the Commission's approach is the decision not to make an independent assessment of its licensees' compliance with the Rehabilitation Act but to take into account any violations of that Act found by the funding agencies charged with the Act's enforcement (see Pet. App. 60a, 71a). In adopting that position, the Commission followed a sound and well-established policy.

The Commission has long considered a proven violation of the law by a broadcast licensee to be a relevant factor in determining whether the grant or renewal of a license is in the public interest. *Violations by Applicants of Laws of United States*, 42 F.C.C.2d 399, 402-403 (1951); see 47 U.S.C. 309(a), 308(a). The Commission expects every licensee to possess good character[38] and therefore takes into account any evidence, such as a proven violation of the law, that suggests that a licensee is incapable of fulfilling its duties as a public trustee. See *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969); *Central Texas Broadcasting Co.*, 74 F.C.C.2d 393, 396 (1979); *Violations by Applicants of Laws of United States*, *supra*, 42 F.C.C.2d at 401.

It has been the Commission's general practice, however, to defer to the final determinations of the appropriate agency or court with respect to the question whether a licensee has violated a particular

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[38] The statutory basis for inquiring into character qualifications is found in Section 308(b) of the Communications Act, 47 U.S.C. 308(b), which states that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station * * *" (emphasis added).

law.[39] The Commission's approach is grounded upon important policy considerations. In deferring to the appropriate enforcement body, the Commission properly relies upon the judgment of institutions with expertise regarding the law in question; it avoids unseemly conflicts with other agencies and the judiciary; it eliminates the possibility of inconsistent judgments; and it conserves scarce governmental resources.[40] The Commission has summarized these considerations as follows (61 F.C.C.2d at 30 n.4):

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[39] See, e.g., *Taft Broadcasting Corp.*, 76 F.C.C.2d 45, 48-51 (1980); *FCC Form 303*, 59 F.C.C.2d 750, 763 (1976), reconsideration granted in part and denied in part, 61 F.C.C.2d 27, 30 n.4 (1976); *WTAR Radio-TV Corp.*, 55 F.C.C.2d 891, 895 (1975); *RKO General, Inc.*, 47 F.C.C.2d 827, 829 (Rev. Bd. 1974); *Northeast Oklahoma Broadcasting Co.*, 40 F.C.C.2d 543, 544 (Rev. Bd. 1973); *Lake Erie Broadcasting Co.*, 33 F.C.C.2d 1009, 1010 (Rev. Bd. 1972); *Bangor Broadcasting Corp.*, 33 F.C.C.2d 687, 689 (Rev. Bd. 1972).

The Commission formalized this policy with respect to employment discrimination complaints in *Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 F.C.C.2d 2320 (1978), petition for review dismissed, *National Association of Broadcasters* v. *FCC*, No. 78-2038 (D.C. Cir. Dec. 17, 1979). Under the terms of the Memorandum, "the FCC may in its discretion await final outcome of a court proceeding and may condition any action on a final court determination." 70 F.C.C.2d at 2328, 2332.

[40] As a general matter, the Commission will not consider allegations that a licensee violated the law if the appropriate enforcement authorities have determined the charges to be without merit. See, *e.g.*, *Sunshine Wireless, Inc.*, 72 F.C.C.2d 739, 742-743 (1979); *Lake Erie Broadcasting Co., supra*, 33 F.C.C.2d at 1010. However, when proceedings are terminated by settlement or by a consent judgment, the Commission may choose to inquire further into the underlying alleged misconduct. *The Western Connecticut Broadcasting Co.*, 44 F.C.C.2d 673, 674 (1973). In addition, under unusual circumstances, the Commission may examine misconduct that has not yet

> In addition to budgetary constraints, the Commission's normal forbearance in this regard has been prompted by the desire both to maintain a proper working relationship with the judiciary and other governmental bodies charged with the responsibility of interpreting and enforcing the laws in question and to avoid burdening renewal applicants with unnecessary, costly multiple hearings.

Not surprisingly, the Commission's policy has met with judicial approval. In *National Organization for Women* v. *FCC*, 555 F.2d 1002, 1016, 1017-1018 (D.C. Cir. 1977), the court of appeals implicitly approved the Commission's decision to await final action by the EEOC or the courts and not to act on the basis of a preliminary EEOC finding that there was " 'reasonable cause to believe' " that a licensee was guilty of employment discrimination. In an earlier case, the same court noted that "when one federal agency has rejected factual charges after an adequate investigation a sister agency may be entitled to rely upon the prior investigation in dismissing factually identical allegations without hearing." *Retail Stores Employees Union, Local 880* v. *FCC*, 436 F.2d 248, 254 n.39 (D.C. Cir. 1970).

The Commission's policy is fully consistent with its obligation under the Communications Act to determine that the granting of a broadcast license is in the public interest. Frequently, as in this case, the Com-

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resulted in a final court or agency ruling. See, *e.g.*, *Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission*, *supra*, 70 F.C.C.2d at 2328. In all such cases, the Commission's concern is limited to the impact of the applicant's activities upon its qualifications as a licensee. *National Organization for Women* v. *FCC*, 555 F.2d 1002, 1017-1018 (D.C. Cir. 1977).

mission will grant an application while reserving the right to take appropriate action upon the resolution of a pending administrative or judicial proceeding. Under certain circumstances, the Commission may also condition the grant upon the outcome of the proceeding or may defer processing the application until the proceeding is terminated.[41] In all cases, the Commission is free to take a proven violation of the law into account in determining whether a license should be revoked or whether renewal should be denied. See 47 U.S.C. 312(a) (revocation proceedings); 47 U.S.C. 309(a), 308(a) (public interest finding is prerequisite to grant of renewal); 47 U.S.C. 308(b) (renewal applications may contain, *inter alia*, information as to character).

4. In sum, the Commission has developed a comprehensive approach to the problem of adapting television to serve the needs of the deaf. The court of appeals, however, favored a different approach. The court of appeals preferred direct enforcement of Section 504 by the Commission and rejected the Commission's longstanding practice of deferring to the appropriate enforcement agency when applying the "public interest" standard (Pet. App. 26a, 29a). The court chose not to articulate the policy reasons underlying its approach, but the soundness of the approach favored by the court is not at issue here. The Commission, not the court of appeals, is the expert body charged by Congress with primary responsibility for determining what the public interest requires under the Communications Act. *FCC* v. *WNCN Listeners Guild*, *supra*, 450 U.S. at 593-594; *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The

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[41] See *Questions Concerning Basic Qualifications of Broadcast Applicants*, 28 Rad. Reg. 2d (P&F) 705, 706 (1973); *Grayson Enterprises, Inc.*, 79 F.C.C.2d 936, 940-941 & n.8 (1980).

Commission's interpretation of the public interest standard was based upon careful consideration of all relevant factors and was clearly reasonable. Its sound exercise of discretion concerning matters peculiarly within its competence should not have been disturbed.[42]

B. The Public Interest Standard Would Lose Utility If Unrelated Statutory Requirements Were Superimposed Upon It

This Court's decisions consistently have held that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). The public interest standard contained in the Communications Act of 1934 was intended as "a supple instrument" for use by the expert body responsible for regulating the rapidly changing field of broadcasting. *FCC* v. *WNCN Listeners Guild*, *supra*, 450 U.S. at 593, quoting *FCC* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 138. That standard would quickly lose its utility, however, if the Commission were forced to superimpose upon it unrelated statutory requirements intended to be enforced by other agencies. The decision below threatens to impose on the public interest

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[42] Ironically, the court of appeals followed the correct approach with respect to the Commission's decision concerning the requirements applicable to commercial stations, stating that it deferred to the Commission's judgment because the Commission "possesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace" (Pet. App. 38a). But the court took a different, erroneous approach with respect to the Commission's determination concerning public television stations.

standard just such an unwarranted and impractical constraint.

Without citing any evidence that Congress intended such a result, the court of appeals held that the "national policy" expressed in Section 504 must be incorporated into the public interest standard (Pet. App. 20a). If the court's decision were correct, then numerous other laws embodying important national policies would also have to be considered for inclusion within that standard. For example, 42 U.S.C. 6102, in language almost identical to that in Section 504, provides, with some exceptions, that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." Similarly, 20 U.S.C. 1681(a) provides, with a few exceptions, that "[n]o person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." If Section 504 must be incorporated into the public interest standard, then it could certainly be argued that 42 U.S.C. 6102 and 20 U.S.C. 1681(a) must be included as well. It could be maintained that the Commission is required to determine whether licensees have complied with those provisions by scheduling adequate programming addressing the needs and discussing the problems of the elderly and of members of both sexes. No doubt similar arguments could be mounted on behalf of other legislation even less closely related to the Communications Act. In this manner, the public interest standard could easily become burdened with extraneous statutory requirements, all designed to serve important national policies.

As precedent for its holding, the court of appeals noted that the Commission itself has adopted regulations dealing with the employment practices of licensees, even though the Equal Employment Opportunity Commission has primary responsibility for enforcement of the provisions of the Civil Rights Act of 1964 prohibiting discrimination in employment (Pet. App. 23a). There is, however, a critical difference between the Commission's voluntary decision to assume such responsibilities and imposition of them by a court.[43] The Commission's "broad discretion" is not abridged if it elects to take on such duties or to look for guidance in other statutes when it is making its public interest judgments. The Commission would not knowingly take action that would interfere with its regulatory mission, and if it later learned that it had done so by inadvertence, its decision could be

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[43] In the decision below, the majority suggested that under this Court's decision in *NAACP* v. *FPC*, *supra*, the FCC must incorporate into its public interest standard consideration of the employment practices of its licensees (Pet. App. 21a-23a). *NAACP* v. *FPC*, however, does not hold that policies established in other statutes must be incorporated into the public interest mandate of a particular regulatory agency simply because such policies are consistent with the statutory responsibilities of that agency. Rather, that case held that it is within the discretionary authority of an agency to consider policies reflected in other statutes when those policies "are directly related to" the agency's purposes (425 U.S. at 671). The FCC's consideration of the employment practices of its regulatees was cited as an instance in which an agency's consideration of matters entrusted to other enforcement bodies nevertheless "can be justified." *Id.* at 670 n.7. See *Office of Communication of the United Church of Christ* v. *FCC*, 560 F.2d 529, 531 (2d Cir. 1977), which cites *NAACP* v. *FPC*, *supra*, for the proposition that the FCC is *authorized*, although *not obligated*, to issue regulations concerning employment discrimination.

reversed unilaterally in most instances.[44] By contrast, the court of appeals, lacking the Commission's expertise in the field of broadcasting and its familiarity with its own regulatory responsibilities, is much more likely to require the agency to assume responsibilities inconsistent with its broader duties. In addition, the court's actions, once taken, cannot easily be undone if the consequences prove undesirable.

The court also noted that the Commission considers antitrust factors in performing its regulatory function (Pet. App. 20a). However, the Communications Act itself directs the Commission's attention to antitrust issues (see, *e.g.*, 47 U.S.C. 313).[45] Indeed, Congress affirmatively intended that the Communications Act would preserve a "field * * * of free competition." *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). Nondiscrimination against the handicapped, although an important national objective, does not bear the same close relationship to the Commission's regulatory goals.[46]

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[44] Indeed, this Court has recognized that, "[u]nderlying the [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 138.

[45] See *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 795 ("[W]hile the Commission does not have power to enforce the antitrust laws as such, it *is permitted* to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard") (emphasis added).

[46] The court of appeals relied upon *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), to demonstrate the "settled proposition that a federal agency, in construing the requirements of the 'public interest' under its governing statute, must

III. REQUIRING THE COMMISSION TO ENFORCE THE REHABILITATION ACT IN LICENSING PROCEEDINGS WOULD PRODUCE ADVERSE PRACTICAL CONSEQUENCES

Not only is the decision of the court of appeals contrary to Congress' intent in enacting the Rehabilitation Act and inconsistent with the Communications Act, but that decision, if sustained, would have adverse practical consequences both for the Commission and for public broadcasters.

First, the decision below will impose a significant and unnecessary administrative burden upon the Commission. During the next three years, almost all of the nation's approximately 270 public television stations will be required to apply for renewal of their licenses. Following the decision of the court of appeals, petitions by aurally handicapped persons may be expected in many such cases. And in every case the Commission will have to determine whether the station has complied with the "underlying national policy" expressed in Section 504. As this Court recognized in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 412 (1979), "the line between a lawful refusal to extend affirmative action and illegal dis-

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at least give weight to federal laws and public policies addressed to similar purposes" (Pet. App. 20a). Referring in particular to the antitrust laws, the Court stated in *McLean* (321 U.S. at 80) that the Interstate Commerce Commission must consider other laws and policies to "the extent * * * Congress indicates a desire to have those policies leavened or implemented" in the administration of the specific legislation committed to the ICC. In the case of Section 504, as we have demonstrated (see pages 21-29, *supra*), Congress has not expressed a desire to have the FCC undertake enforcement responsibilities. On the contrary, Congress committed the enforcement of that provision to the funding agencies and did not envision enforcement in licensing proceedings.

crimination [is not] always * * * clear." Yet the Commission will be required to determine what Section 504 requires without the benefit of an interpretation from the funding agencies charged with the responsibility for enforcing that statute. Moreover, since the decision below unequivocally requires the Commission to begin enforcing Section 504 at once, the Commission will be compelled to define that provision's requirements on a case-by-case basis during licensing proceedings.

Second, the court of appeals' decision creates a serious potential for conflicting administrative requirements. Because the court insisted that the Commission interpret Section 504's requirements in licensing proceedings and without awaiting the articulation of standards by the funding agencies, the Commission's interpretation of Section 504's requirements in the field of television programming may well precede those of the funding agencies. If the funding agencies do not follow the Commission's lead, then broadcasters may be faced with inconsistent administrative commands.[47] If, on the other hand, the funding agencies feel compelled to abide by the Commission's interpretation, then the primary responsibility for interpreting Section 504 will be shifted from those agencies, contrary to Congress' intent. As the Chief Justice

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[47] By contrast, procedures have been established to prevent conflicts among the funding agencies. The Attorney General is responsible for coordinating those agencies' rule-making efforts (Exec. Order No. 12,250, 45 Fed. Reg. 72995 (1980)), and 28 C.F.R. 41.6 provides for interagency cooperation in enforcing Section 504 and regulations issued thereunder. Although it is conceivable that FCC regulation in this area could be coordinated with that of the funding agencies, the decision of the court of appeals deprives the FCC of the ability to coordinate in this fashion, since the court will not allow it to await action by those agencies.

recently has observed: "[t]o the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly." *NAACP* v. *FPC*, 425 U.S. 662, 674 (1976) (Burger, C.J., concurring) (emphasis in original).

Third, the decision below threatens to impose upon the Commission and noncommercial television stations the burden of protracted and costly hearings. Noncommercial television stations vary greatly in size, financial strength, audience, and independent production capabilities. Their ability to provide special services for the hearing impaired therefore varies widely as well. In apparent recognition of these differences, the decision below indicates that Section 504's requirements will vary from station to station (Pet. App. 27a). The Commission is directed to assess each station's "willingness—as measured against *its capacity and its viewers' need*—to provide programming for the aurally handicapped" (*ibid.*) (emphasis added). If a petition to deny license renewal based on noncompliance with Section 504 is filed, the station's "capacity" to provide service to the hearing impaired and "its viewers' need" may constitute "substantial and material questions of fact" (47 U.S.C. 309(d)) requiring a "full hearing" (47 U.S.C. 309(e)). Such hearings would impose a substantial and unnecessary financial burden upon already hard-pressed noncommercial stations, as well as the Commission.[48]

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[48] Moreover, it would be manifestly unfair to judge a public station's compliance with Section 504 during the previous license term by reference to an individualized standard to be determined only after an application for license renewal is

CONCLUSION

The portion of the court of appeals' judgment vacating the Commission's denial of the petition opposing KCET's application for license renewal should be reversed.

Respectfully submitted.

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filed. That, however, is what the court of appeals apparently has required.

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REPLY BRIEF FOR PETITIONER COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA

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Petitioner,

v.

SUE GOTTFRIED, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONER COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA

ARGUMENT

The only question before the Court in these consolidated cases is whether the policy reflected in Section

504 of the Rehabilitation Act is automatically incorporated into the public interest standard of the Communications Act so as to require the Federal Communications Commission ("Commission") to decide whether a non-commercial educational television station has complied with Section 504 before it may renew the station's license.

Little in the briefs of Respondents Gottfried, *et al.* ("Gottfried"), and the Deaf Counseling, Advocacy and Referral Agency, *et al.*, appearing as *amici curiae* ("Amici"), is addressed to that narrow legal question. Their thrust is in other directions, including toward two questions that the Court specifically declined to hear (Gottfried Br. at 18, 29-31, 30 n.40; Amici Br. at 32-48), and Constitutional questions not even submitted to the Court (Gottfried Br. at 39-45; Amici Br. at 18 n.5, 28-32).[1]

In this Reply we shall first restore the case to proper focus. Then, we shall address the more egregious flaws in Gottfried's and Amici's briefs.

I. THE BRIEFS OF GOTTFRIED AND AMICI DISTORT THE FOCUS OF THESE CASES.

Rather than ignoring television service for the deaf, as Gottfried and Amici claim, the Commission has addressed the matter on several occasions since 1970 in responsive and helpful ways. *See* KCET Br. at 4-9. After weighing complex technological and economic considerations the

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[1] The questions rejected were (a) whether Section 504 required noncommercial stations to take affirmative action to make the aural portion of television programs accessible to the deaf (No. 81-298) and (b) whether grant of a broadcast license constitutes federal financial assistance (No. 81-651). The Constitutional questions were not raised in any petition for writ of certiorari.

Commission developed policies designed to encourage programming for the deaf without imposing requirements that would disadvantage the viewing public as a whole or inhibit technological advance.

Without pointing to a single failure by Petitioner Community Television of Southern California ("Community") to comply with the Commission's announced policies, Gottfried challenged Community's 1977 application for license renewal for KCET. Gottfried faulted KCET under the public interest standard for failing to provide "sufficient" amounts of non-emergency programming that was specially captioned, signed or otherwise made accessible for the deaf, even though the Commission had ruled that stations were not obliged to provide such service. Gottfried also claimed that KCET had violated Section 504 by "discriminating" against the deaf, "excluding" them from television, and "denying them the benefits" of television.

The Commission's reaction to Gottfried's two claims was straightforward and consistent both with its policy toward specialized programming for the deaf under the public interest standard and with its past practices in comparable situations involving alleged violations of other laws by its licensees. It found that Gottfried had not raised a substantial and material question about KCET's discharge of its duties toward the deaf as the Commission had defined them under the public interest standard. As for the Section 504 claim, the Commission observed that funding agencies were responsible for deciding whether fund recipients were in compliance with that law, but it made clear that it would evaluate the impact of a funding-agency finding of a Section 504 violation upon Community's qualifications to hold KCET's license.

Although evidently nettled by the Commission's decision not to require more substantial specialized programming for the deaf by *all* television stations, the Court of Appeals stopped short of requiring the Commission to broaden its interpretation of the public interest standard when applying it to commercial stations. However, the Court of Appeals, focusing on Section 504's applicability to recipients of federal financial assistance, did command the Commission to broaden the public interest standard to include compliance with Section 504 when evaluating the KCET renewal application. The Court of Appeals justified this bifurcation of the public interest standard on the ground that Section 504 was incorporated into the standard as a matter of law as far as non-commercial stations are concerned.

Our opening brief explains that the Court of Appeals erred by expanding the public interest standard in a way that the Commission had reasonably rejected. KCET Br. at 19-26. This Court has established that the public interest standard does not automatically incorporate the policies of other statutes, *id.* at 26-31, and that the Congress has given the Commission broad authority, subject to limited judicial review, to define the scope and content of the standard, *id.* at 20-23. With respect to television service for the deaf, the Commission properly exercised its authority, and the Court of Appeals exceeded its proper role. *Id.* at 23-26. Even if the Court of Appeals had been correct as to the scope and content of the public interest standard, it nonetheless intruded impermissibly on the Commission's authority to determine how best to implement the standard. *Id.* at 31-41. The Court of Appeals should not have denied the Commission discretion either to rely on guidance from funding agencies as to Section 504 compliance, *id.* at 32-37, or to establish requirements for its licensees prospectively, *id.* at 37-41.

Neither Gottfried nor the Amici have overcome any of those points. Indeed, they barely address them. Rather, they seek to justify the Court of Appeals' decision by arguments resting on the fictions of a "discriminatory" KCET "callously disregarding" the needs of the deaf, of a Commission that has "deferred and deflected" consideration of these needs while participating in a government "shell game" designed to leave the deaf in "limbo," and of a broad national policy that compels the Commission to require specialized programming for the deaf.

II. THE PRINCIPAL ARGUMENTS OF GOTTFRIED AND AMICI LACK FOUNDATION IN FACT OR LAW.

A. KCET Has Not Discriminated Against Or Shown "Callous Disregard" For The Deaf.

Gottfried asserts that KCET has shown "callous disregard" for the needs of the deaf and has discriminated against them. Gottfried Br. at 8, 9, 15-19. Amici assert variously that KCET provided the deaf with "*no* protection" and "no access" and "virtually excluded" them from television. Amici Br. at 19, 32, 38 (emphasis in original). But mere repetition of such claims does not establish their truth.

In the 1974-77 license period in question, KCET broadcast more than 960 programs that were accessible to the deaf. KCET Br. at 10 & n.13. Gottfried has never successfully challenged that showing and appears now to concede it. Gottfried Br. at 9 n.9.[2] Moreover, Gottfried's claims about KCET's handling of the "Captioned ABC

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[2] Gottfried's brief shows that the fraction of KCET's total programming that was accessible to the deaf was roughly commensurate with the fraction of the total population of Los Angeles that was deaf. *Compare* Gottfried Br. at 4 n.3 *with id.* at 9 n.9.

Evening News," *id.* at 8-9, were specifically held by the Commission not to have been an abuse of its programming discretion. KCET App. at 51a n.9.

Both of the fora that have decided Gottfried's Section 504 claims against KCET have vindicated the station. A federal district court dismissed Gottfried's complaint because she had "failed to prove that KCET has discriminated against the deaf or hearing impaired."[3] The

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[3] Dismissal was pursuant to Fed. R. Civ. P. 41(b) before KCET even put on its defense. Greater Los Angeles Council on Deafness v. Community Television of Southern California, Civ. No. CV-78-4715-R (C.D. Cal. order entered Nov. 2, 1981), *appeal docketed*, Civ. App. No. 82-5054 (9th Cir. Feb. 5, 1982). The history of the case is described in KCET's Brief at 12 n.19. Developments since the brief was filed include the denial of KCET's Rule 60(b) motion, the appeal of that denial, the Ninth Circuit's consolidation of that appeal with several earlier appeals in the case, and Judge Real's stay of an order, pending appeal, requiring the government defendants to pay $430,000 in attorneys' fees to plaintiffs' counsel.

Gottfried's brief cites various papers filed in that district court litigation that the Court of Appeals, *sua sponte*, ordered submitted for its record, J.A. 3-5, and that Gottfried insisted be printed in the Joint Appendix here. (All but 12 pages of the Joint Appendix consists of such matter, but Gottfried's brief cites less than half of the pages she demanded be printed—81 of 178). Most of the printed material that is cited consists of argumentative pleadings rather than evidence. *E.g.*, J.A. 18-22, 33-41, 57-59, 68-87, 129-39. Other parts were ruled inadmissible as evidence by the District Court. *E.g.*, J.A. 145-46, 164-88. Some of the printed and cited material actually demonstrates the folly of Gottfried's unreasonable claims against KCET. For example, the lynchpin of Gottfried's claim of "callous disregard" concerns KCET's handling of the "Captioned ABC Evening News." Gottfried Br. at 8-9. While 113 non-commercial stations may have been carrying that program on January 31, 1977, J.A. 184-87, some 142 stations, in addition to KCET, apparently were not. *See* FCC News Release 78976 (March 4, 1977) (showing that 256 non-

Department of Education denied Gottfried's complaint because "KCET is in compliance with Section 504 with respect to the assistance it received from this Department."[4] KCET Br. App. at 1a. Moreover, the comment by a U.C.L.A. law student upon which both Gottfried and Amici rely heavily includes the observation that the judgment of the Court of Appeals is "incongruous" because "KCET . . . has done much more for the hearing impaired than any other station in the Los Angeles area." Comment, *Television and the Hearing Impaired*, 34 Fed. Com. L.J. 93, 100 n.34 (1982).

B. The Commission Did Not "Defer And Deflect" Questions Relating To Broadcasting For The Deaf.

Building on the erroneous assertion that KCET has discriminated against the deaf, Gottfried argues that the Commission has "failed to do anything to prevent [such] discrimination," has sought "to defer and deflect" questions relating to broadcasting for the deaf, and has been a participant in a "sorrowful twelve-year governmental shell-game." Gottfried Br. at 4, 11, 34, 44. Like the discrimination claim against KCET, these assertions bear little relation to the facts.

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commercial television stations were operating on January 31, 1977). Moreover, while Gottfried is sharply critical of KCET's eventual broadcast of that program at 11:30 p.m., her printed material shows that none of the 14 stations in the Pacific and Mountain Time Zones that broadcast the program did so at an earlier local time than KCET. J.A. 184-87.

[4] Contrary to Gottfried's assertion, Gottfried Br. at 10 n.11, there is agreement between the district court and the Department of Education concerning the lack of foundation for Gottfried's claims that KCET had violated Section 504. These other fora focused on time periods that overlapped with or differed from the license period considered by the Commission.

The Commission has twice indicated in this very case that it would evaluate a determination by a funding agency of a Section 504 violation by KCET. KCET App. at 52a, 62a.[5] Moreover, Gottfried disregards the long record of the Commission's consideration of the needs of the deaf. *See* KCET Br. at 4-9. The Commission *has* required that emergency notices be accessible to the deaf. *Emergency Messages—Television*, 61 F.C.C.2d 18 (1976), *modified on reconsideration*, 62 F.C.C.2d 565 (1977). It also *has* encouraged broadcasters to provide other specialized programming for the deaf, and *has* indicated it would undertake rulemaking if voluntary actions were not adequate. KCET App. at 67a; *Deaf Viewers—Use of TV to Inform*, 26 F.C.C.2d 917, 918-19 (1970). But in light of complex economic and technological considerations, as well as the competing interests of the deaf and non-deaf, the Commission has not required the specialized programming advocated by Gottfried.[6] The Commission's policy reflects its carefully considered

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[5] The Commission has made clear that it would take into account judicial findings as well as those of responsible agencies other than the Department of Health, Education and Welfare. Equal Employment Opportunity—Handicapped, 76 F.C.C.2d 86, 96 n.19, *reconsideration denied*, 80 F.C.C.2d 299 (1980), *petition for review pending* California Ass'n of the Physically Handicapped v. FCC, No. 80-7157 (9th Cir. filed Mar. 26, 1980).

[6] The Commission perceived that requirements for specialized programming would freeze technology, thereby impeding developments that would allow increased services for the deaf without interference with services for the non-deaf. Captioning for the Deaf, 63 F.C.C.2d 378, 388 (1976). Gottfried does not dispute that technological progress has been made under the Commission's policy. *Compare* Deaf Viewers—Use of TV to Inform, *supra*, at 918 (listing then available ways to serve the deaf: "visual bulletins," "descriptive phrases" on weather maps, "presentation of the face of announcer"

judgment of how best to assure that all the public, including the deaf, are served. The decision was faithful to the substantive directives of the Communications Act, 47 U.S.C. §§ 151, 303(g), and 307(b), pointed to by Gottfried. Gottfried Br. at 23. It was also precisely the kind of decision that the Congress entrusted to the Commission rather than to the courts.[7]

C. There Is No National Policy Requiring Television Stations To Provide Specialized Programming For The Deaf.

The cornerstone of Gottfried's brief is that, because the Commission has *chosen* to include in the public interest standard certain national policies prohibiting employ-

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for lipreading, and the like) *with* Proposed Authorization of Transmission Teletext by TV Stations, 46 Fed. Reg. 60,851, 60,852 (1981) (describing technology that allows not only closed captions for programming, but also written "weather reports, news, comparative shopping prices, . . . community bulletins, . . . commercial data and messages"). Moreover, Gottfried does not dispute that under the Commission's policy there has been steadily increasing availability of specialized programming for the deaf, particularly by public television stations. *See* KCET Br. at 8 & n.8.

[7] Gottfried and Amici contend that the Court of Appeals did not usurp the Commission's discretion or intrude upon its proper functions because the court merely ordered the Commission to incorporate Section 504 requirements when applying the public interest standard and did not prescribe exact standards for compliance. Gottfried Br. at 3, 18, 46; Amici Br. at 38-46. But the fact that the Court of Appeals did not usurp or intrude *completely* does not mean that it did not usurp or intrude *impermissibly*. The impermissible usurpation and intrusion occurred first when the Court of Appeals overturned the Commission's decision not to require non-commercial stations to provide non-emergency specialized programming for the deaf, and again when the Court of Appeals ordered retrospective application of the court-directed new policy to KCET in an individual licensing case.

ment discrimination against racial minorities or women, it is *compelled* to incorporate a policy said to flow from Section 504 concerning specialized programming services for the deaf.[8] Gottfried Br. at 24-30. Gottfried's argument is seriously flawed.

First, the Commission is not *required* to incorporate and effectuate policies derived from other statutes into the public interest standard of the Communications Act. *See* KCET Br. at 26-31; CBS Inc. Br. at 6-17. In construing the standard in another statute, this Court emphasized that "[t]he use of the words 'public interest' . . . is not a directive . . . to seek to eradicate discrimination." *NAACP* v. *FPC*, 425 U.S. 662, 670 (1976). Indeed, the Commission is not even *authorized* to enforce national policies derived from other statutes unless it first makes an independent determination that the public interest requires their consideration. *See FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). In this case, the Commission reasonably decided not to incorporate in the public interest standard specialized programming obligations for the deaf, except for emergency messages. *See* KCET Br. at 4-9.

Second, the specialized programming for the deaf that Gottfried seeks is not required by the principles of equal treatment that guide national policies against racial and

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[8] Gottfried and Amici seem to argue that the public interest standard, considered without reference to Section 504, requires the Commission to evaluate in the license renewal process the adequacy of a broadcaster's specialized programming for the deaf. This argument was rejected by the Court of Appeals. KCET App. at 34a-37a. Its acceptance here would require reversal of the Court of Appeals' judgment as to the commercial stations, a matter not before the Court, and thus Gottfried and the Amici may not properly present such an argument. *See infra* p. 16.

sexual discrimination in employment. It is the handicap of deafness itself—not any action by broadcasters—that prevents the deaf from achieving access to the aural portion of regular television broadcasts. In order to provide the deaf with access to television programming, broadcasters must significantly modify the services they provide to the public at large.[9] The failure to undertake such special affirmative actions is not discrimination prohibited by Section 504.[10] *See Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979).

Third, Gottfried's reliance on the Commission's treatment of policies directed at employment of women and racial minorities is misplaced in other respects. The Congress has not yet made the national policy with regard to the handicapped commensurate with the national policy with regard to employment of racial minorities and women. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes private-sector employment

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[9] For example, captioning involves the transcription of the sound track, the condensation of the text, and the insertion of captions in synchronization with visual action. *See* KCET Br. at 5 n.3. Any captioning is thus expensive, *see* KCET Br. App. at 4a-5a, and imposes substantial administrative burdens. And, because of the varying reading abilities of the deaf population, it may be necessary to adjust captioning so as to accommodate varying levels of reading proficiency. *See* Shulman & Decker, *Multi-level Captioning: A System for Preparing Reading Materials for the Hearing Impaired*, 124 Amer. Annals of the Deaf 559, 560, 567 (1979).

[10] Thus, neither the policy of Section 504 nor its explicit terms require public television to provide specialized programming for the deaf. *See* KCET Br. at 34 n.38. This conclusion is reinforced by the fact that the Congress has never objected to the Commission's long-standing policy with regard to non-emergency programming for the deaf. *See* Udall v. Tallman, 380 U.S. 1, 16-18 (1965).

discrimination against women and minorities illegal, whereas Section 504 is directed only at recipients of Federal financial assistance.[11] Moreover, there are no technological considerations or countervailing public interests at stake in the context of employment discrimination against women and racial minorities that are like those that are involved in providing specialized television programming for the deaf. *See* KCET Br. at 4-9.

Finally, even if there had been a national policy to require specialized television programming for the deaf, and even if the Commission had been required to effectuate this policy by its public interest determinations, it still does not follow that the Commission was required to do more than it has done. The Commission recognized that the public interest standard encompassed the broad question of programming for the deaf, but it decided, in its expert judgment, that the best approach was to encourage, but not to require, non-emergency programming. *See, e.g., Captioning for the Deaf, supra*, at 389. Thus Gottfried's argument could succeed only if the Commission were required to enforce not only the "policy" of Section 504, but also Gottfried's expansive reading of its explicit requirements. However, that would destroy the Commission's "broad discretion" to determine how best

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[11] Gottfried's reliance on the White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, tit. III, 88 Stat. 1631, 1631-34 (1974), as a source of broad national policy is similarly misplaced. Gottfried Br. at 6, 16, 29. The Act merely authorized a future Conference to "give special consideration to recommendations." *Id.* § 302(d). It imposed no substantive requirements.

to achieve the goal of the Communications Act.[12] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981). Where, as here, the Commission has evaluated the competing public interests and has attempted to balance them, a court should not second-guess the Commission's expert judgment. *See, e.g., Bowman Transportation* v. *Arkansas-Best Freight System*, 419 U.S. 281, 293-94 (1974).

D. The Commission Is Not Reponsible For Enforcing Section 504 Or Effectuating Its Policies.

Gottfried does not dispute that the Congress intended for Section 504 to be enforced only by agencies that provide financial assistance. *See* KCET Br. at 33 & n.35; FCC Br. at 21-29. Rather, Gottfried erroneously argues that funding agencies have not fulfilled their enforcement obligations under Section 504 and that, therefore, the

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[12] Both Gottfried and Amici incorrectly argue that Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), required the Commission to resolve Gottfried's Section 504 complaints. Gottfried Br. at 20, 24, 27, 31; Amici Br. at 39-40. That case involved a broadcaster that allegedly had cut off network programming concerning racial matters and, on other occasions, had presented one-sided programs urging segregation. The Commission renewed the broadcaster's license without a hearing on the ground that there was an urgent need for a station in the area. The Court of Appeals held that the grant of renewal was erroneous and remanded for a hearing. Among many grounds of distinction, that case, unlike this one, did not involve an intrusion on the Commission's authority to define the content of the public interest standard, for the Commission there had agreed that the allegations, if true, would constitute a major violation of the standard. *Id.* at 1007. The other cases relied upon by Gottfried and Amici similarly do not involve the core issue in this case—the fundamental interference with the Commission's broad authority to define the content of the public interest standard.

Commission must assume those enforcement duties or at least the responsibility for effectuating the policies of Section 504. Gottfried Br. at 34-39.

At the threshold, it seems clear that Section 504 does not impose any specialized programming obligations on non-commercial television stations. Deaf persons are not "otherwise qualified" to participate in the aural part of television and Section 504 does not require affirmative actions that involve substantial financial or administrative burdens. *See* KCET Br. at 34 n.38.

In any event, the deaf have not been "shuttled around the federal bureacracy." Gottfried Br. at 13.[13] Gottfried's Section 504 claims appear to be the only ones that have been directed at public television stations by the deaf. Gottfried's claim against KCET at the Department of Health, Education and Welfare, was considered and re-

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[13] Gottfried states that KCET argued to the district court that it should defer to the Commission and then argued to the Commission that it should defer to HEW. Gottfried Br. at 13, 14, 37. Gottfried's assertion that KCET made inconsistent arguments rests solely on her selective editing for the Joint Appendix of material that KCET submitted to the district court. J.A. at 148-50. In fact, as the complete submission will show, KCET argued to the district court that *both* the Commission and HEW were involved in the matter of television access for the deaf, and that therefore, because "the issues presented by plaintiffs are, and have been for some time, the subject of consideration and action by *agencies* having special expertise," the court should defer until "*such an agency* has acted." Memorandum of Community Television of Southern California in Support of Motion for Summary Judgment, Greater Los Angeles Council on Deafness v. Community Television of Southern California, *supra* note 3, at 80 (filed Sept. 28, 1979) (emphasis added). (The Memorandum was made part of the record in this case by the Court of Appeals on Dec. 24, 1980. J.A. 5). There was no inconsistency in KCET's arguments that judicial action should await agency action and that, as to Section 504 compliance specifically, the Commission should defer to HEW.

jected by the successor Department of Education. KCET Br. App. at 1a. The district court in California considered and rejected Gottfried's claim against KCET in the suit she prosecuted contemporaneously with her HEW claim. Resolution of the claim against KCET that Gottfried filed last year with the Department of Commerce appears to have been awaiting further submissions by Gottfried since last spring. In short, the only agency petitioned by Gottfried that has declined to reach a decision under Section 504 was the Commission. As a non-funding agency the Commission's decision to forbear and to defer to funding agencies was correct.[14] *See* KCET Br. at 32-36; FCC Br. at 21-32; CBS Inc. Br. at 18-24.

Even if one were to assume *arguendo* that Section 504 imposes affirmative programming obligations and that the agencies charged by the Congress with enforcing Section 504 have been dilatory, it by no means follows that the Commission must assume enforcement responsibility. The Congressional delegation to the funding agencies is not to be ignored so lightly. *See* KCET Br. at 32-36. If agencies responsible for Section 504 do not fulfill their obligations, the proper response is a suit against those agencies, not the imposition of additional burdens on the Commission. In fact, Gottfried has also pursued this very remedy.

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[14] Gottfried may have been unsuccessful in her Section 504 claims, but she has not been mistreated. All concerned have been grappling with the difficult technological and other problems associated with extending television service more fully to the deaf. *See* KCET Br. at 4-9.

E. The Commission's Policy With Regard To Programming For The Deaf Does Not Violate Constitutional Commands.

Gottfried argues that the deaf are denied certain First and Fifth Amendment rights by the failure of broadcasters to provide specially accessible programming for them. Gottfried Br. at 39-45. These arguments sweep impermissibly beyond the narrow question that is before the Court. *See United States* v. *Bass*, 404 U.S. 336, 339 n.4 (1971); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-78 (1938); Sup. Ct. R. 21.1(a), 445 U.S. 1007 (1980). Moreover, if accepted, they would require the modification of the public interest standard not only for public stations, but also for commercial stations. Because the arguments would require a reversal of an aspect of the judgment of the Court of Appeals that is not before the Court, they are improper. *See United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924).

In any event, Gottfried's constitutional claims fail for lack of governmental action.[15] But even if the governmental involvement here were sufficient to bring constitutional considerations into play, Gottfried's arguments still must fail. With respect to the First Amendment, this Court "has never approved a *general* right of access to the media." *CBS, Inc.* v. *FCC*, 453 U.S. 367, 396 (1981) (emphasis in original). As the Court of Appeals

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[15] The First and the Fifth Amendments impose restraints on governmental, not private actions. Gottfried attempts to meet the governmental-action requirement by arguing that the Commission issues valuable broadcast licenses and public television receives Federal financial assistance. Gottfried Br. at 39-43. The Court of Appeals held that a broadcast license was not Federal financial

below concluded, the First Amendment "sweeps no more broadly than the public interest standard" as already defined by the Commission.[16] KCET App. at 28a n.54. As to the Fifth Amendment, any inequality in access to television programming faced by the deaf is the result of the disproportionate impact of a neutral broadcasting system and does not reflect an invidious intent to discriminate. Thus, regardless of the level of scrutiny, such broadcasting does not raise a legitimate equal protection

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assistance. KCET App. at 28a-33a. Moreover, far stronger financial ties than those urged by Gottfried have been seen as inadequate to constitute governmental action. *See* Rendell-Baker v. Kohn, 102 S.Ct. 2764 (1982); Blum v. Yaretsky, 102 S.Ct. 2777 (1982).

Gottfried also argues that the governmental-action requirement is satisfied "because the FCC has not imposed any [programming] obligation on the station[s]." Gottfried Br. at 43. But governmental inaction, or acquiesence, or even mere approval is insufficient to constitute governmental action. *See* Blum v. Yaretsky, *supra*, at 2786. *See also* Lugar v. Edmundson Oil Co., 102 S.Ct. 2744 (1982); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973) (Burger, C.J., joined by Stewart and Rehnquist, JJ.).

[16] Any requirement that broadcasters make programming accessible to the deaf would constitute a major intrusion on program content. Open or closed captioning both restricts editing flexibility because of need for time to write and insert captions before broadcast, and serves to inhibit or discourage "live" television. Open captions obliterate part of the normal visual display, and, like other generally visible means of communicating with the deaf, are intrusive and distracting to the non-deaf viewing audience. *See* KCET Br. at 5; Comment, *Television and the Hearing Impaired*, *supra*, at 146 & n.278, 150-51. Thus, consideration of First Amendment principles would lead to the rejection, rather than the adoption, of mandatory programming for the deaf. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 121-32 (1973).

claim.[17] *See Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977); *Washington* v. *Davis*, 426 U.S. 229, 238-48 (1976).

F. The Court Of Appeals Usurped The Commission's Authority To Determine How Best To Implement The Public Interest Standard.

Gottfried does not even address the point that, regardless of the content of the public interest standard, the judgment of the Court of Appeals must be reversed because the court denied the Commission the opportunity to establish new requirements by rulemaking or other prospective means. KCET Br. at 37-41. The approach of the Court of Appeals is particularly inequitable here because, both in 1970 and again only a few months before Gottfried first petitioned to deny KCET's license, the Commission had explicitly declined to impose non-emergency programming obligations to benefit the deaf. *Captioning for the Deaf*, *supra*, at 389; *Deaf Viewers—Use of TV to Inform*, *supra*, at 918. The Court of Appeals has left no doubt that an agency "must give notice that [a] standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed in effect." *Boston*

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[17] In any event, equal protection scrutiny must be less than strict because the handicapped are not viewed as a suspect class, *see* Brown v. Sibley, 650 F.2d 760, 766 (5th Cir. 1981); Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71, 76-77 (1st Cir. 1981), and access to television does not rise to the level of a fundamental right, *cf.* San Antonio School District v. Rodriguez, 411 U.S. 1, 29-39 (1973).

Edison Co. v. *FPC*, 557 F.2d 845, 849 (D.C. Cir.), *cert. denied*, 434 U.S. 956 (1977); *see RKO General, Inc.* v. *FCC*, 670 F.2d 215, 222-24 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1974 (1982). Inexplicably, the Court of Appeals here ordered the Commission to proceed in the very manner it has held agencies may not proceed in other cases.

CONCLUSION

The judgment of the Court of Appeals should be reversed with instructions that the Commission's orders denying Gottfried's petition against Community's 1977 license renewal application are to be affirmed.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-298

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

No. 81-799

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

I.

a. The first point in our opening brief was (FCC Br. 21) that "Congress intended that Section 504 would be enforced by the agencies providing federal financial assistance and not by licensing agencies like

the FCC." The importance of this point is obvious, for if Congress did not intend the FCC to enforce Section 504, then the decision of the court of appeals, which did not rest upon constitutional grounds, must be reversed.

Respondents have not addressed this potentially dispositive point directly, and they have simply ignored the authorities upon which it is based. Indeed, respondents appear to concede either expressly or by their silence most of the matters asserted in this portion of our brief. Respondents agree (Resp. Br. 27-28; see FCC Br. 21) that Section 504 was patterned after Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d ("Title VI"), and Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) ("Title IX"). Respondents do not contest the fact that Congress provided for the enforcement of the latter provisions by those agencies responsible for distributing federal aid (see FCC Br. 21-22). Respondents do not comment on the legislative history showing that "Congress clearly intended that Section 504 would be enforced in a similar manner" (FCC Br. 22-23). They do not deny that similar enforcement machinery for Section 504 was thereafter established by regulation, and they do not comment upon the legislative history of the 1978 amendments to the Rehabilitation Act which shows that Congress approved this enforcement scheme (FCC Br. 23-25). Respondents do not even address the 1978 amendment, 29 U.S.C. (Supp. IV) 794a(a)(2), which provides that persons aggrieved by violations of Section 504 shall have the benefit of the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964." Respondents also have failed to come to grips with the legislative history and

judicial precedent showing that Congress contemplated that Section 504 would be enforced through the exercise of specific remedial powers not possessed by the FCC (FCC Br. 25-29).

Respondents have chosen to argue this case almost as if Congress' intent in enacting Section 504 is of no consequence. That approach may be attributable to a recognition that the decision below cannot be reconciled with Congress' intent, or to respondents' desire to press constitutional arguments (see Resp. Br. 18-19, 39-45) not fairly embraced by the questions which this Court agreed to review.[1] In any event, Congress' intent in enacting Section 504 is of paramount importance, and the general "tenet[s] of administrative law" upon which respondents rely (Resp. Br. 20) are relevant only in the absence of

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[1] These arguments should be rejected on numerous grounds. Respondents' Fifth Amendment arguments were not raised until their reply brief in the court of appeals and were not discussed by the court of appeals. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312 (1971); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). The court of appeals observed that respondents only "seem[ed]" to raise a First Amendment argument (FCC Pet. App. 28a n.54). However, no constitutional questions were raised in the petitions granted by this Court, and respondents failed to urge such an argument as a "ground why the cause should not be reviewed by this court" (Sup. Ct. R. 22.1). See *Wiener* v. *United States*, 357 U.S. 349, 351 n.* (1958). Nor was such an argument raised in respondents' petition, which was denied. *Gottfried* v. *FCC*, cert. denied, No. 81-651 (Jan. 11, 1982). Moreover, acceptance of these arguments would dictate alteration of a portion of the judgment not before the Court. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 n.11 (1975); *Strunk* v. *United States*, 412 U.S. 434, 437 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972); *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 381 n.4 (1970).

a more specific manifestation of congressional purpose.

b. If there is any portion of respondents' brief that is relevant to our first argument, it is contained on pages 28 to 31 of their brief. This critical portion of respondents' brief therefore merits examination in some detail. After noting that Section 504 was modelled upon provisions of Title VI and Title IX, respondents state (Resp. Br. 28, quoting S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39 (1974)) that Section 504 "was intended to establish 'a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.'" However, the mere fact that Congress intended to implement such a policy sheds no light upon the narrow question presented here: *which* agencies are charged with responsibility for enforcing that policy.

Respondents next maintain (Resp. Br. 28-29) that in enacting the Rehabilitation Act "Congress intended to afford the handicapped the same, if not greater nondiscriminatory treatment as it legislated under Titles VI and IX for minorities and women." The authority cited (Resp. Br. 28 n.36) for the proposition that the handicapped were meant to have "greater nondiscriminatory treatment" is a press release of the Secretary of the Department of Health, Education and Welfare—hardly evidence of Congress' intent—and, in any event, the press release says nothing about "greater" rights for the handicapped.

Respondents rely (Resp. Br. 28-29 & n.36) upon a provision of the White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, 88 Stat. 1631, but that Act merely authorized the President to call a White House Conference on Handicapped Individuals "in order to develop recommendations and

stimulate a national assessment of problems, and solutions to such problems, facing individuals with handicaps" (Section 302). The Act did not impose new enforcement responsibilities upon federal agencies or reallocate those assigned by previous laws. Quoting a portion of Section 302(d)(4) of the Act (88 Stat. 1632), respondents state (Resp. Br. 29; emphasis added) that "Congress * * * *wanted all levels of government to work to enable* individuals with handicaps 'to have access to usable communication services and devices at costs comparable to other members of the population.'" What that provision states, however, is merely that participants, who included private individuals as well as government representatives, "*shall give special consideration to recommendations for* * * * enabling individuals with handicaps to have access to usable communication services and devices at costs comparable to other members of the population" (Section 302(d)(4) (emphasis added)).[2]

After noting that the FCC voluntarily adopted regulations dealing with the employment practices of licensees prior to the enactment of Section 504, respondents state (Br. 29) that adoption of that provision "could only be understood to have supported or enhanced the interests of the disabled with respect to broadcasters receiving federal assistance." While respondents' observations may be correct, it hardly

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[2] The congressional finding in Section 301(7) (see Resp. Br. 7, 16) is similarly wide of the mark. Section 301 (88 Stat. 1631) states in pertinent part: "The Congress finds that— * * * (7) all levels of Government must necessarily share responsibility for developing opportunities for individuals with handicaps * * * and it is therefore the policy of the Congress that the Federal Government work jointly with the States and their citizens *to develop recommendations and plans for action* in solving the multifold problems facing individuals with handicaps" (emphasis added).

follows that Congress intended the FCC to enforce those "enhanced" rights. Respondents note (Resp. Br. 29) that in 1970 the FCC issued a Public Notice advising all licensees that television's capacity "to alert, assist and entertain persons with impaired hearing should be utilized to the 'fullest extent.' " *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F.C.C.2d 917 (1970) (see FCC Br. 3-4). But we do not see how this Public Notice, which did not impose any mandatory requirements, can possibly show that Congress intended the FCC to enforce Section 504. On the contrary, if Congress was aware of the Commission's policy when it enacted Section 504 and wished to change that policy, it would have presumably done so expressly.

Respondents assert (Resp. Br. 30) without citing any supporting authority that "passage of the Rehabilitation Act of 1973 mandated an urgency * * * in this case to consider the effect of television broadcasters' actions with respect to the deaf or hearing impaired." But this assertion begs the critical question in this case: *which agency or agencies* are required to consider whether a broadcaster has violated Section 504.

Finally, respondents contend that Section 504 should apply to commercial and noncommercial stations alike since "all broadcasters are recipients of federal financial assistance by their receipt of extremely valuable licenses" (Resp. Br. 30 n.40; see also Resp. Br. 30, 40-42). Not only is this argument beyond the scope of the questions that this Court agreed to review (see note 1, *supra*), but it concerns the very issue presented by respondents' petition for a writ of certiorari (No. 81-651 (Jan. 11, 1982)), which this Court denied.

In sum, respondents have utterly failed to refute our contention (Br. 21) that "Congress intended that

Section 504 would be enforced by the agencies providing federal financial assistance and not by licensing agencies like the FCC."

c. Respondents nonetheless maintain (Resp. Br. 34-39) that the court of appeals' decision was justified because, in their view, the funding agencies have not discharged their enforcement responsibilities. However, even if the funding agencies had not fulfilled their responsibilities, respondents' argument would be beside the point. As explained in our opening brief (FCC Br. 31), "[t]here is no precedent for the proposition that a court may transfer the responsibility for enforcing a statute from one agency to another if it believes that the agency to which Congress committed that responsibility has failed to perform the duties assigned by statute."

Moreover, respondents have failed to substantiate their dramatic claim of a "saga of bureaucratic failure" (Resp. Br. 34). Contrary to respondents' assertion (Resp. Br. 35 & n.47), the Department of Commerce *has* "adopted procedures for receiving and resolving complaints for noncompliance with Section 504" (FCC Br. 29).[3] See 45 C.F.R. 80.8(d). We also stand by the statement (FCC Br. 29-30) that the Department of Education is prepared to receive and adjudicate such complaints. Indeed, Abraham Gottfried, Esq., counsel for respondents, is well aware of those procedures because he has filed complaints against KCET with both departments.[4] Respondents

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[3] Respondents state (Resp. Br. 35 n.47; emphasis in original): "The FCC's references to the Department of Commerce's so-called regulations (nn.11-16) were to *proposed* regulations only." And that is precisely what we called them (FCC Br. 10 nn.10, 11). As we noted (FCC Br. 9-10 nn.10, 11), the Department of Commerce is temporarily operating under the Section 504 regulations originally issued by HEW.

complain (Resp. Br. 37) about the Department of Education's rejection of Mr. Gottfried's complaint, but surely a complainant's dissatisfaction with one agency's decision does not mean that the courts should transfer enforcement responsibility elsewhere.[5]

Respondents argue (Resp. Br. 37) that the FCC, not the funding agencies, has expertise in the field of broadcasting. However, the FCC does not have specialized expertise concerning how other agencies' funds should be spent or how Section 504 should be construed. More important, the Commission already has brought its expertise to bear upon the problem of

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[4] Respondents seize upon the fact (Resp. Br. 36) that the Commission's orders in this case referred to HEW as the proper agency to consider respondents' Section 504 claim (see FCC Pet. App. 60a, 71a). At the time of those orders, HEW was not only one of the principal sources of federal funds received by public broadcasters but was responsible for coordinating the implementation of Section 504 (see FCC Br. 11 n.17). The Commission has subsequently made it clear that it "did not mean to imply in [its] Los Angeles decision that it would limit its consideration only to DHEW's actions" and that it would consider Section 504 findings "made by any agency or court with jurisdiction" (*Equal Employment Opportunity—Handicapped*, 76 F.C.C.2d 86, 96 n.19 (1980), reconsideration denied, 80 F.C.C.2d 299 (1980), petition for review pending *sub nom. California Association of the Physically Handicapped, Inc.* v. *FCC*, No. 80-7157 (9th Cir., docketed Apr. 1, 1980)).

[5] Respondents contend (Resp. Br. 37) that the Department of Education's decision was based only on data from 1981. However, the 1981 figures appear to have been used only to illustrate the cost of closed-captioning programs supplied to KCET without captions (see KCET Br. 4a-5a). Rather than relying upon the 1981 data, the decision held that KCET had fulfilled its Section 504 obligations by "routinely transmitting the encoded signal for those programs which it receives in closed-captioned form" (*id.* at 5a).

making television accessible to the hearing impaired and has thus far declined to impose mandatory requirements. Accordingly, the court of appeals' decision, which overturned the Commission's expert judgment, can hardly be defended in the name of the Commission's "expertise over the broadcasting industry" (Resp. Br. 37).[6]

Finally, respondents' reliance (Resp. Br. 38-39) upon *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), is puzzling. Because the Court there recognized a private cause of action under Title IX, respondents argue that the FCC must enforce Section 504. However, this Court has never suggested that Title IX must be enforced by the FCC or any other agency that does not provide federal financial assistance, and the courts of appeals uniformly have recognized a private cause of action under Section 504. Thus, *Cannon* does not support respondents' argument in the slightest.

II.

Respondents' principal argument appears to rest upon the proposition that "a Federal administrative agency incorporates in its 'public interest' standard those Congressional policies which relate to the underlying purposes of the agency's organizational legislation" (Resp. Br. 20). However, either this proposition is patently false or it fails to explain the court of appeals' decision in this case.

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[6] Respondents' comments concerning the regulatory guidelines being prepared by the Justice Department (Resp. Br. 38) are also misdirected. The Justice Department, pursuant to its responsibility to coordinate the enforcement of Section 504 (Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980)) is drafting the regulations in consultation with the funding agencies so that unified federal standards will emerge.

a. Respondents' argument is false if it means that an administrative agency responsible for issuing licenses or certificates in the "public interest" or under a similar standard must also construe and enforce every statute related to the agency's regulatory mission, even if enforcement of that statute is committed by statute to another agency. If that were true, Congress could not effectively divide administrative responsibility for a particular field among two or more agencies; agencies could freely usurp the functions of related agencies; and courts could compel agencies to assume responsibilities regardless of the Congressional allocation. These consequences illustrate the fallacy in respondents' argument.

What respondents' argument would mean in practice may be illustrated by the division of administrative responsibility in a field such as aviation. Just as every radio and television station must have a license issued by the FCC under its public interest standard, every air carrier must have a certificate of public convenience and necessity issued by the Civil Aeronautics Board (49 U.S.C. 1371). In determining whether the issuance of such a certificate is warranted, the CAB must consider the "promotion of safety in air commerce" "as being in the public interest, and in accordance with the public convenience and necessity" (49 U.S.C. 1302(e)). And just as any member of a radio or television station's audience may petition to deny the station's application for license renewal (47 U.S.C. 309(d)(1)), any interested person may file a protest or memorandum of opposition to an air carrier's application for a certificate of public convenience and necessity (49 U.S.C. 1371(c)).

The CAB, however, is by no means the only government body concerned with aviation and air safety.

The Secretary of Transportation has the responsibility for issuing air carrier operating certificates, which are conditioned upon a carrier's ability to conduct a safe operation (49 U.S.C. 1424). The Secretary is also responsible for certifying aircraft, airports, and airmen (49 U.S.C. 1422, 1423, 1432) and for issuing minimum standards or rules concerning such matters as aircraft design, manufacture, maintenance, inspection, and practices, methods, and procedures needed for safety (49 U.S.C. 1421(a)). In addition, the National Transportation Safety Board has the responsibility for investigating aircraft accidents and ascertaining how they can best be prevented (49 U.S.C. 1441).

If administrative agencies were compelled to incorporate all related laws into a public interest or related standard, then presumably the CAB would be obligated to shoulder many of the duties committed by law to the Secretary of Transportation or the National Transportation Safety Board. Thus, if a protest was lodged alleging that an applicant for a certificate of public convenience and necessity operated an unsafe type of aircraft, landed at unsafe airports, or bore the responsibility for a particular accident, the CAB would have to make an independent determination and could not rely upon or await the decisions of the governmental bodies responsible for such matters. Such a diffusion of administrative responsibility would produce chaotic consequences. See *NAACP* v. *FPC*, 425 U.S. 662, 674 (1976) (Burger, C.J., concurring).

Not surprisingly, none of the three cases cited by respondents even remotely supports such a result. In *NAACP* v. *FPC*, *supra*, upon which respondents rely (Resp. Br. 20), this Court held that the Federal Power

Commission lacked authority to adopt a rule permitting the filing of a complaint with the Commission by anyone who believed himself to have been subjected to employment discrimination by a regulated company. Rejecting the argument that such authority was conferred by references to the "public interest" in the Gas and Power Acts, the Court observed (425 U.S. at 669), that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." The Court noted (*id.* at 670) that "the parties point[ed] to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation."

NAACP v. *FPC*, *supra*, which held that the FPC *lacks authority* to adjudicate employment discrimination claims brought against regulatees, cannot be read to mean that an agency like the FPC *is required to enforce* all laws related to the principal purpose of the Gas and Powers Acts, *i.e.*, "encourag[ing] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices" (425 U.S. at 670). The Court's opinion implicitly rejects that argument. The Court explained (*id.* at 671) that the FPC is not obligated "to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees." Yet one of the purposes of the laws concerning such practices—eliminating practices that impair "the efficiency * * * or operation of the instrumentalities of commerce" (29 U.S.C. 151)—is certainly related to "the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."

McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944), also lends no support to respondents' argument. In that case, the Court rejected the contention that the Interstate Commerce Commission was required to disapprove any merger of trucking lines that would have violated the Sherman Act, as well as the alternative contention that the ICC had not given due weight to the antitrust laws in approving the merger at issue. After noting that such mergers were exempt from the antitrust laws, the Court explained (*id.* at 79-80):

> The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. * * *
>
> But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned.

Here, the FCC was not "faced with overlapping and at times inconsistent policies embodied in other legislation." It was instead faced with a provision (Section 504) whose requirements in the field of television programming were as yet undefined. More important, in this case there is no evidence that Congress desired to have Section 504 "leavened or implemented in the enforcement of the various specific provisions of the

legislation with which the Commission is primarily and directly concerned" 321 U.S. at 80. Indeed, as previously noted, respondents have barely attempted to answer our argument that Congress intended Section 504 to be enforced by those agencies that provide financial assistance and not by other agencies like the FCC.

Finally, in *NBC* v. *United States*, 319 U.S. 190, 222-224 (1943), this Court held only that the FCC was authorized to deny a license under the public interest standard on the ground of anticompetitive practices. See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (the FCC "*is permitted* to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard" (emphasis added)); *United States* v. *RCA*, 358 U.S. 334, 351 (1959). Perhaps more important, the Communications Act itself makes specific reference to the antitrust laws (see 47 U.S.C. 313). Indeed, as originally enacted, the Act expressly authorized the Commission to withhold licenses from persons convicted of antitrust violations. Act of June 19, 1934, ch. 652, Section 311, 48 Stat. 1086, 47 U.S.C. (1946 ed.) 311 (repealed 1952). See *NBC* v. *United States*, *supra*, 319 U.S. at 222-223. There is no evidence of a similar interrelationship between the Communications Act and Section 504.[7]

Respondents' reliance (Resp. Br. 25-27) upon the FCC's rules governing employment discrimination by

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[7] The court of appeals also referred (FCC Pet. App. 20a) to *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968). In that case, this Court held that the Federal Maritime Commission had properly considered antitrust principles in implementing its public interest standard. The Court did not suggest that the FMC was obligated to pave the way in interpreting the antitrust laws.

licensees is similarly misplaced. First, the Commission adopted those rules on its own initiative. This Court has observed that those regulations "*can be justified* as necessary to enable the FCC to satisfy its obligation under the Communications Act" (*NAACP* v. *FPC*, *supra*, 425 U.S. at 670 n.7 (emphasis added)). Second, enforcement of those rules does not and did not require the Commission to lead the way in interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the enforcement of which is committed to the Equal Employment Opportunity Commission. Third, as the Commission has carefully explained, the eradication of employment discrimination on the basis of "race, color, religion, national origin, or sex" (47 C.F.R. 73.2080(a)) is fundamentally different from the problem of making special provision for the handicapped. See *Equal Employment Opportunity—Handicapped*, 76 F.C.C.2d 86, 95, 99 (1980), reconsideration denied, 80 F.C.C.2d 299 (1980), petition for review pending *sub nom. California Association of the Physically Handicapped, Inc.* v. *FCC*, No. 80-7157 (9th Cir., docketed Apr. 1, 1980); FCC Pet. App. 58a-59a. The two problems are distinguished by significant constitutional, historical, and technological factors.[8]

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[8] Respondents suggest (Resp. Br. 26) that the Commission's regulations were based in part upon Title VI, which was the statutory model for Section 504. They cite (Resp. Br. 26) a reference to federal contractors in the Commission's order promulgating those requirements (*Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 769 (1968)). It is clear, however, that the Commission was not referring to Title VI, which applies only to certain types of federal contracts (see 45 C.F.R. 85.3(e), redesignated as 28 C.F.R. 41.3(e), 46 Fed. Reg. 40686 (1981)). Instead, the Commission was referring to the "requirement under Executive Order 11246 * * * that pertinent [federal] contracts

In sum, there is no support for the contention that an agency charged with promoting the public interest is compelled to construe and enforce all laws whose underlying policy has some arguable relationship to the laws the agency is responsible for administering.

b. If respondents do not mean that an agency like the FCC must actually interpret and enforce related statutes but only must abide by the general policy those statutes express, then their argument fails to explain or justify the decision below.

As we showed in our opening brief, the FCC has heeded the mandate of the Communications Act to "generally encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)). Starting before the Rehabilitation Act was enacted, the Commission has developed a comprehensive approach to the technically and economically complicated problem of making television accessible to the hearing impaired (see FCC Br. 2-7, 35-43). The general principle of nondiscrimination expressed by Section 504 adds nothing to the factors already considered by the Commission under the public interest standard. Neither respondents nor the court of appeals has pointed to anything in the language of 504 or its legislative history that specifies what that provision was intended to require in the field

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include undertakings that the party will not discriminate against any employee because of race, creed, color, religion, sex, or national origin" (13 F.C.C.2d at 767 n.2). Title VI is not even mentioned in the Commission's survey of antidiscrimination laws applicable to licensees (*id.* at 767-768). Moreover, even if the Commission had looked to Title VI in voluntarily adopting the rules dealing with employment discrimination, it would hardly follow that by modelling Section 504 upon a provision of Title VI Congress intended to compel the Commission to adopt mandatory requirements concerning television programming for the hearing impaired.

of television programming. Thus, at least until Section 504's requirements in this area are specified by the funding agencies and the courts, neither that provision nor its underlying policy can provide meaningful guidance for the Commission. Accordingly, the court of appeals' decision cannot be justified on the ground that the Commission improperly ignored the problem of making television accessible to the deaf. And surely the Commission's "broad discretion" in determining how best to secure the maximum benefits of broadcasting for all the people (*FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981)), permitted it to confront this problem directly under its own public interest standard rather than under the general principle of nondiscrimination embodied in Section 504.

c. Respondents' remaining arguments are predicated upon the false belief that government fiat is the only reasonable way of making television programming understandable to the deaf. Consequently, because the Commission has chosen a different approach, respondents charge that it has "defer[red] and deflect[ed] the question of broadcasting service to the deaf indefinitely" (Resp. Br. 34) and has "[swept] aside * * * all rights of the deaf" (Resp. Br. 45; see also Resp. Br. 3, 17, 21, 44). Contrary to respondents' accusations, however, the Commission has addressed "the question of broadcasting service to the deaf" but has simply concluded that, at present, technological and financial problems are such that mandatory requirements should not be imposed under the Communications Act except with respect to emergency announcements.

Again starting from the premise that government-imposed requirements constitute the only rational approach, respondents argue that it was unreasonable for the Commission to decline to impose such require-

ments either by rulemaking or adjudication (Resp. Br. 31-34). Labelling this "Catch 22 jurisprudence" (Resp. Br. 33) and an "administrative shell game" (Resp. Br. 11), respondents refuse to recognize that the Commission's considered approach was entirely reasonable and well within its discretion.[9]

d. Respondents pay lip service to the Commission's "broad discretion" (Resp. Br. 21 n.20) in determining what is required under the public interest standard (*FCC* v. *WNCN Listeners Guild*, *supra*, 450 U.S. at 594), but they would actually impose severe restrictions upon it. Thus, in this case, they would limit the Commission's discretion to determining "the appropriate standard for compliance with Section 504 by public broadcasters" (Resp. Br. 21 n.20; see also Resp. Br. 3, 18). Respondents would deny the Commission discretion to pursue its present approach, which eschews mandatory requirements; indeed, they would not even permit the Commission to proceed under its own public interest standard rather than Section 504. Plainly, this view would leave little substance to the "broad discretion" of the Commission as recognized in this Court's past decisions.

CONCLUSION

The portion of the court of appeals' judgment vacating the Commission's denial of the petition opposing KCET's application for license renewal should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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[9] Of course, because the Commission has not imposed mandatory requirements, it was not obligated to hold a hearing to determine whether KCET had met such requirements. See 47 U.S.C. 309(e); compare Resp. Br. 20, 31-34.

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Nos. 81-298, 81-799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,
Petitioner,

v.

SUE GOTTFRIED, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

SUE GOTTFRIED, *et al.*,
Respondents.

On Writs of Certiorari To The United States Court Of Appeals for The District Of Columbia Circuit

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BRIEF OF THE DEAF COUNSELING, ADVOCACY AND REFERRAL AGENCY, INC.; NORCAL CENTER ON DEAFNESS, INC.; DEAF COMMUNITY SERVICES OF SAN DIEGO; CALIFORNIA ASSOCIATION OF THE DEAF, LOS ANGELES CHAPTER; SELF-ACTUALIZATION INSTITUTE FOR THE DEAF, INC.; LOS ANGELES CLUB OF THE DEAF, INC.; TEMPLE BETH SOLOMON OF THE DEAF; BEYOND SOUND; DISABILITY LAW CENTER; DISABILITY RIGHTS AND EDUCATION DEFENSE FUND; THE WESTERN LAW CENTER FOR THE HANDICAPPED; AND THE NATIONAL ASSOCIATION OF THE DEAF AS *AMICI CURIAE* URGING AFFIRMANCE

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SOLOMON OF THE DEAF; BEYOND SOUND; DISABILITY LAW CENTER; DISABILITY RIGHTS AND EDUCATION DEFENSE FUND; THE WESTERN LAW CENTER FOR THE HANDICAPPED; AND THE NATIONAL ASSOCIATION OF THE DEAF AS AMICI CURIAE URGING AFFIRMANCE

INTERESTS OF THE AMICI CURIAE

Amici are representative of a broad range of organizations across the country, all of whom have an interest in the outcome of this litigation.

Four of the organizations provide various social services, such as education, counseling and job placement, to the deaf and hearing impaired. Two of the groups are organized primarily for social or religious purposes and have deaf memberships. Three of the organizations provide direct legal services to handicapped people, including the deaf. Two groups are organized primarily to advance and protect the interests of deaf people and another is a deaf television and film company.

Although as a group the organizations

serve to fill various needs of the deaf community, they all seek to advance and protect the welfare and interests of deaf people, particularly their opportunities for and interests in greater access to society's institutions.

Amici are specifically interested in this case because of its likely effect on the accessibility of public television for the deaf. Amici are vitally concerned that deaf people have the same opportunity as the hearing to obtain the full benefits of public television. Amici believe that the Federal Communications Commission (FCC) has failed to meet its obligations under the public interest standard of the Communications Act of 1934, 47 U.S.C. § 151 et seq. (1976), to insure that public broadcast licensees consider the access needs of their deaf viewers. Without such consideration, amici believe that public television will remain largely the province of the hearing.

QUESTIONS ADDRESSED BY AMICI

1. Whether, under the public interest standard of the Communications Act of 1934, public television broadcasters are required to consider the needs of their deaf viewers?

2. Whether, in order to implement the public interest standard, the FCC is required to hold a hearing in a license renewal proceeding of a public television station, once well pleaded allegations are made that the station has not considered the access needs of its deaf viewers?

SUMMARY OF ARGUMENT

I. Deaf people have been excluded from enjoying the many benefits that television offers the rest of our society. Because the deaf have special needs, full access to television could help meet these needs. The deaf are deprived of oral language and communication which typically results in a deep sense of isolation from the world of the hearing.

The impact of their isolation is devastating. The deaf have experienced great difficulties in education and as a result their academic achievements, on the average, fall well below hearing norms. The deaf suffer from underemployment and low pay. They have little or no political power and have been historically segregated from the mainstream of our society.

In light of these special needs, denying the deaf accessibility to television is particularly disturbing. Television is recognized as having a powerful influence on the socialization process: it teaches mores, exposes the viewer to varying cultures, and affects moral and ethical growth. Television, particularly public television, is an educational tool. It would be of particular importance to the deaf who often have inadequate exposure to English. Finally, television plays a critical role in the democratic process of self-government, providing the primary means by which citizens

become informed and effective political decision-makers. The deaf minority thus needs access to television to gain the same opportunity as the hearing to exercise their rights and responsibilities of self-government.

The Communications Act of 1934 obligates the FCC to regulate television licensees in the public interest. Since the core purpose of the Act is to secure maximum benefits of the broadcast media to all of the people, the FCC must act to bring the benefits of television to the deaf.

II. The Court of Appeals correctly ordered the FCC to conduct a hearing once well pleaded allegations were made that a public broadcaster had not considered the needs of its deaf viewers. On the one hand, the order was consistent with prior court decisions that recognize that the proper role of the courts is to step in when it

appears that the FCC is shirking its public interest obligation. On the other hand, the order, as limited in scope and affect as it was, is fully consistent with the narrow role that the courts should play. The Court of Appeals properly deferred to the special expertise of the Commission to consider all the factors involved in applying the mandate of the public interest standard to the particular proceedings below. Furthermore, the court properly left the FCC free to choose among the various dispositional alternatives available to it.

A full hearing will allow the development of a factual record so that there can be a proper consideration of all relevant factors as mandated by the public interest standard of the Act.

ARGUMENT

I.

DEAF PEOPLE HAVE SPECIAL NEEDS THAT ARE ENTITLED TO CONSIDERATION IN FCC LICENSE RENEWAL PROCEEDINGS OF PUBLIC TELEVISION BROADCASTERS.

Television is a "vital part of our system of communication" and has "swiftly become a major factor in the dissemination of ideas and information." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 116 (1973). Television educates, acculturates, socializes, reinforces social ethics and is the significant democratizing medium in the world. Its ascendency has been compared to the advent of the printing press, for it is the "most thoroughly attended to, most pervasive and probably most influential means of propagating ideas in this country today." Adler, "Understanding Television," in Television as a Social Force 65 (1974).[1]

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[1]The average American will spend approximately nine years watching television during a lifetime. G. Noble, Children in Front of a Small Screen 7 (1975).

It has, as well, "unmatched potential" for changing society. Comment, Achieving Diversity in Media Ownership: Bakke and the FCC, 67 Calif. L.Rev. 231 (1979).

Despite its place in American society and the influence it has on all of us, television remains essentially inaccessible to one significant component of our society -- the deaf. The FCC itself has underscored this concern:

> Estimates of the number of citizens who have limited hearing and therefore have need for the receipt of news and entertainment material through appropriate television programming range from 8.5 million to 20 million. Many of these persons, it appears, live alone and oftentimes do not receive important new information unless advised by neighbors or friends.

The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing 26 F.C.C.2d 917 (1970).

Not surprisingly the FCC has noted that television is "ideally suited to bring news, informational material and entertain-

ment" to the deaf and hearing impaired. Id. It is therefore of "utmost importance," the FCC stated, that the deaf "enjoy the tremendously powerful television medium." In the Matter of Amendment of Subpart E, Part 73 of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, 63 F.C.C.2d 378, 388 (1976).

The issue before this Court is limited in scope but of "utmost importance" to deaf citizens: whether under the Communications Act's public interest standard, the FCC must, in response to well pleaded allegations, hold a hearing to determine a public television station's willingness to consider the accessibility needs of its deaf viewers. In order to answer this question, consideration should be made of both the widely recognized special needs of the deaf in light of severely restricted access

to television and the tremendously powerful impact that television will have on the deaf if it is made accessible to them.

A. The Deaf Minority has Special Needs.

The ability to communicate through the use of symbols (aural or visual) is unique to the human condition. Virtually everything an individual does or a society accomplishes has, at its foundation, communicative conduct. The American philosopher and educator, John Dewey, stated that society exists in and through communication. J. Dewey, Philosophy and Civilization 87 (1931).

Our society is primarily speech-based, for we express and comprehend the interchange of thought through the hearing/speaking mode. This of course has profound consequences for the deaf. Helen Keller described the core of the problem eloquently:

> The problems of deafness are deeper and more complex, if not more important, than those of blindness. Deafness is a much worse misfortune for it means the loss of the most vital stimulus -- the sound of the voice that brings language, sets thoughts astir and keeps us in the intellectual company of man.

H. Keller, Helen Keller in Scotland 68 (1933).

The basic deprivation of deafness is not only the deprivation of sound, but also the deprivation of language and therefore communication. K. Meadow, Deafness and Child Development 17 (1980).[2] From an early age, the deaf child often lacks "gratifying, reciprocal" communication and this deprivation grows more acute with age. H. Schlesinger & K. Meadow, Sound and Sign: Childhood Deafness and Mental Health 2, 89 (1972).

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[2]Deaf people have, of course, a rich and effective symbolic language -- sign language. Historically, the hearing world has erroneously assumed that the deaf cannot develop language without the ability to hear and speak. E. Mindel & M. Vernon, They Grow in Silence 2 (1971). See note 4 infra.

The existence of a communication barrier results in a keen and disturbing sense of isolation from the world outside the deaf community, for "[u]nlike other handicaps, profound prelingual deafness [loss of hearing before the development of language] renders the person extremely isolated. . . . A profoundly deaf person can effectively communicate with no one when he leaves the presence of one trained in sign language." Springdale School District v. Grace, 494 F. Supp. 266, 267 (D. Ark. 1980), aff'd., 656 F.2d 300 (8th Cir. 1981).[3]

In addition, the deaf experience a significant stigmatization because of their

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[3]Indeed, studies have found that the "frustrations and loneliness born of isolation" among the deaf are so great as to result in a disproportionate rate of mental illness. E. Mindel & M. Vernon, supra, note 2, at 100-01. In addition, the lack of effective, reciprocal communication and the resultant social isolation explains certain generalized characteristics found among some deaf adults, e.g., egocentricity, immaturity, impulsiveness, irritability, and suggestibility. H. Schlesinger & K. Meadow, supra at 2.

handicap; they are separated because of, and identified negatively by, their hearing loss. Comment, Television and the Hearing Impaired, 34 Fed. Com. L.J. 93, 104-05 (1982). The discomfort and frustration borne of the communication difficulties between the deaf and hearing as well as prejudicial attitudes and preconceived notions, cause a rigid segregation of the one from the other. Id. at 106.

Isolated from the world of the hearing, the deaf have out of necessity developed a highly cohesive subculture, banding together for cultural and social events to such an extent that they have their own language,[4] clubs, churches and sporting events. B. Benderly, Dancing Without Music: Deafness in America 220-21 (1980).

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[4]American Sign Language is recognized as a complete language with its own syntax and grammatical structure, likened more to Russian or Chinese than to English. See D. Cokely & C. Baker, American Sign Language 1-7 (1980). Not surprisingly, a great many deaf adults have poor English skills, thus written as well as oral communications between

In addition to the isolation experienced by the deaf, other consequences flow from the communication barrier. Most deaf people, for example, have experienced significant difficulties in school, on the average achieving only a fourth grade reading level. Television and the Hearing Impaired, supra at 110. The deaf also are chronically underemployed, having incomes averaging only 70 percent of their hearing counterparts. Id. at 111-12.

Forming a subgroup in our society, largely isolated from the mainstream, typically poorly educated, and ignored by the political process, the deaf have found it hard to organize politically. B. Benderly,

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the hearing and deaf are often difficult at best and totally ineffective at worst. E. Mindel & M. Vernon, supra, note 2, at 44. In addition, it is a common misperception that deaf people can communicate through lipreading. The most skilled speechreaders can understand, at best, one-third of spoken English since most spoken sounds appear so similar on the lips. B. Benderly, supra at 166.

supra at 266. There are virtually no deaf people in the traditional seats of power: corporate boardrooms, legislatures, elective or appointive governmental positions or the courts. See Television and the Hearing Impaired, supra at 115.

The deaf have suffered through a long history of discrimination and abuse. It was not until early in this century that the widespread practice of confining the deaf to segregated institutions (e.g., mental hospitals) was stopped. Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara Law. 855, 384, 888-90 (1975). Until this century too, deaf people were legally

presumed to be incompetent and were thus prohibited from contracting, serving as witnesses or making wills. Television and the Hearing Impaired, supra at 114, 114 n.110. Most states still prohibit deaf people from serving on juries and almost half of the states have yet to adopt statutes which require communication access (e.g., interpreters) for the deaf in civil proceedings. See Note, Jury Selection: The Courts, The Constitution, and the Deaf, 11 Pac. L.J. 967, 967-68 (1980); Note, Procedural Due Process: A Deaf Defendant's Right to Be Heard Should Encompass a Right to "Hear" Civil Trials Through Interpretation, 29 Cath. U.L. Rev. 867, 879 (1980). See e.g., Eckstein v. Kirby, 452 F. Supp. 1235 (E.D. Ark. 1978). Not long ago, deaf children were excluded from public schools because it was assumed they were backward or uneducable. Burgdorf & Burgdorf, supra at 872; Large, Special

Problems of the Deaf under the Education for All Handicapped Children Act of 1975, 58 Wash. U.L.Q. 213, 223-228 (1980).

With such a history the deaf stand in compelling need of extraordinary protection.[5] In this case, however, they

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[5]Within the confines of this case, this Court has no need to decide whether or not the deaf minority constitute a suspect class for the purposes of an equal protection analysis under the Fifth Amendment. See e.g., Boiling v. Sharpe, 347 U.S. 497 (1954). Amici suggest, however, that because the deaf minority clearly meet the "traditional indicia of suspectness," San Antonio School District v. Rodriquez, 411 U.S. 1, 16 (1973) (they have been politically powerless, experienced a history of discrimination, and are saddled with obvious disabilities), this reason alone should compel this Court to carefully scrutinize the discrimination here. The thrust of most of the relevant court decisions and virtually all of the legal commentary has been toward the application of heightened judicial scrutiny of official discrimination against the handicapped in general and the deaf in particular. E.g., Medley v. Ginsberg, 492 F. Supp. 1294, 1301-02 (S.D.W.Va. 1980) (discrimination against mentally retarded persons, recognized as powerless, raises significant equal protection claim); New York Ass'n for Retarded Children, Inc. v. Carey, 466 F. Supp. 487, 504 (E.D.N.Y. 1979) (mentally retarded persons denied equal protection); Panitch v. Wisconsin, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (mentally retarded persons denied equal protection); Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975) (discrimination against

received no protection from either the public broadcaster or the FCC; they were not even provided the minimal protection afforded by a hearing.

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retarded persons, recognized as being excluded from the political process, warrants heightened judicial scrutiny); Mills v. Board of Education, 348 F. Supp. 866 (D.C. Cir. 1972) (mentally retarded persons denied equal protection); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 n.8, 296 (E.D. Pa. 1972) (discrimination against mentally retarded persons raised colorable claim of denial of equal protection); In re G.H., 218 N.W. 2d 441, 447 (N.D. 1974) (severely handicapped persons have immutable characteristics and meet the Rodriquez standard as a suspect class); Adoption of Richardson, 251 Cal. App. 2d 222, 239-40, 59 Cal. Rptr. 323, 334 (1967) (deaf persons denied equal protection); Burgdorf & Burgdorf, supra (advocating strict scrutiny for handicapped discrimination); Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate, 1976 U. Ill. L.F. 1016 (1976) (advocating strict scrutiny); Comment, The Right to a Meaningful Education in California: Should Dollars Make the Difference? 10 Pac. L.J. 991 (1979) (advocating strict scrutiny); Jury Selection: The Courts, The Constitution and the Deaf, supra (advocating strict scrutiny for discrimination against deaf persons); Television and the Hearing Impaired, supra (advocating strict scrutiny for discrimination against deaf persons); Comment, The Equal Protection and Due Process Clauses: Two Means of Implementing "Integrationism" for Handicapped Applicants for Public Employment, 27 DePaul L. Rev. 1169 (1978) (advocating intermediate scrutiny).

B. Access to Television is Essential to Meet the Special Needs of the Deaf Minority.

The isolation and stigmatization that the deaf experience is both exemplified and exacerbated by the inaccessibility of television for the deaf. Television may indeed be the only authentic American melting pot -- it is the one experience virtually all Americans share in common. It is this experience which is closed to the deaf. But more than this, the deaf are deprived of all that television offers. To the extent that the medium teaches ethics, stimulates cultural awareness, motivates individual learning, and fosters socialization, democratization and self-government, deaf people are deprived of those benefits. In light of their special needs, most if not all of these benefits are of particular significance to the deaf.

1. Deaf people are being denied the social and cultural benefits of television.

Television is considered an agent of socialization equal to the influence of parents, schools, churches, peers, siblings and community. G. Comstock, S. Chaffee, N. Katzman, M. McCombs & D. Roberts, Television and Human Behavior 284-85 (1978) [hereinafter cited as Comstock et al.]

Television's importance to the deaf cannot be understated. It would teach the deaf the mores and culture of our society thereby building a link between their isolated world and the rest of our society. Television and the Hearing Impaired, supra at 118-19. It also would inform the deaf, as it has the rest of society, about different cultures and in the process help break down other cultural barriers. See Comstock et al., supra at 258, 262-63; H. Himmelweit,

A. Oppenheim & P. Vance, Television and the Child 245 (1958).

Television changes attitudes and teaches norms, id. at 263, and shapes people's conceptions of their occupational, social and national roles, see Noble, supra at 241.[6]

Television raises moral questions and affects moral growth. See Ryan "Television as a Moral Educator," in Television as a Cultural Force 112, 117 (D. Cater & R. Adler eds., 1976). It would expose the deaf child, for example, to the same experience.

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[6]Studies indicate that television can help overcome phobias, increase self-control and awareness of feelings, and teach persistence, cooperation, sharing and the ability to display affection. G. Comstock et al., supra at 251, 253-57. It also can correct harmful social stereotyping. See, e.g., Achieving Diversity in Media Ownership, supra at 231 (racial images); Comment, Ring Around the Collar - Chain Around Her Neck: A Proposal to Monitor Sex Role Stereotyping in Television Advertising, 28 Hastings L.J. 149, 150 (1976) (sex roles).

Finally, television would teach deaf children the difference between fiction and reality, see H. Himmelweit, A. Oppenheim & P. Vance, supra at 245, and would prepare deaf children to act in the future while teaching them the importance of rational action, Noble, supra at 218.

Television then would play a vital social and cultural role for the deaf minority. It would not only serve to break down stereotypes about the deaf but would stimulate them "to broaden their intellectual reach" while strengthening the deaf community and "granting greater opportunities to interact with elements of the larger society." J. Schein & R. Hamilton, Impact 1980: Telecommunications and Deafness 5 (1980).

2. Deaf People are being denied the educational benefits of television.

It is virtually uncontestable

that children learn from television. Comstock et al., supra at 261-63. Television teaches "in much the same way that school lessons slowly, over the years, tutor the uninformed mind and teach it 'how to think'." Novak, "Television Shapes the Soul," in Television as a Social Force, supra at 9-10. See H. Himmelweit, A. Oppenheim & P. Vance, supra at 229. [7]

Of special significance to the deaf, television teaches language by contributing to the vocabulary of children, Gary, "Television's Impact on the Child," in Children and Television 13 (Bulletin 21A,

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[7] Deaf children may watch more television than their hearing counterparts. Raymond, "How About That:" T.V. Programs for Deaf Students, 125 Amer. Annals of the Deaf 721 (1980). It is ironic because "without the benefit of the audio track, deaf children have only limited understanding of TV programs. They are denied complete access to information and are frustrated by bits and pieces they do receive....[V]irtually no commercially produced children's programs have been captioned for broadcast." Shulman & Decker, Multi-level Captioning: A System for Preparing Reading Materials for the Hearing Impaired, 124 Amer. Annals of the Deaf 559, 560 (1979).

undated), and stimulating them to read, Neuman, Television: Its Effects on Reading and School Achievement, 33 Reading Teacher 801, 804 (1980).

Many deaf people, especially those who are prelingually deaf, have difficulty with English because it differs from American Sign Language in syntax, structure and idiomatic expressions. Television would provide the deaf necessary exposure to English to allow greater comprehension of its structure and idioms. Television and the Hearing Impaired, supra at 118 n.134.

Beyond language development, television would teach deaf people more about the world, thus reducing their "experiential deficiency" and the sense of separation from the rest of the world. Id. at 118 n.133. See H. Furth, Thinking Without Language: Psychological Implications of Deafness 121-24, 187

(1966); Moore, The Inclusion of the Deaf Within Communication Networks, 119 Amer. Annals of the Deaf 598 (1974).[8]

Access to television is thus critical for deaf people. Access to public television in particular is especially important for the deaf because of its emphasis on educational, informational and community affairs programming for children and adults. Such access then would be indispensable for the deaf to insure the same opportunity the hearing have to learn outside the classroom.

3. Deaf people are being denied the informational benefits of television, essential for effective self-government.

Television plays a dynamic and power-

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[8] A number of researchers and sociologists have found that for people like the deaf, who have limited access to the outside world, television improves awareness about that world. See H. Himmelweit, A. Oppenheim & P. Vance, supra at 233, 312; B. Greenberg & B. Dervin, Use of the Mass Media by the Urban Poor 51-52 (1970). Television would serve the same crucial role for the deaf.

ful role in the self-government process unique to America. It informs the people and is now recognized as one of the two most widely utilized sources for news and discussion of public affairs. FCC v. National Citizens Committee for Broadcasters, 436 U.S. 775, 815 (1978); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 116 (1973).[9] Of particular significance is television's powerful influence on public opinion and political decision-making. See N. Minow, J. Martin & L. Mitchell, Presidential Television 5 (1973).[10] It crystallizes and reinforces political thought and supplies information for effective political decision-making. Comstock et. al., supra at 337, 341.

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[9] Sixty-seven percent of the public looks to television as their main source of news. Comment, The Future of Content Regulation in Broadcasting, 69 Cal.L. Rev. 555, 576 n.165 (1981).

[10] Television also teaches about self-government and how government works. Comstock et. al., supra at 207-08.

It is this ability to trigger democratic action and stimulate individual participation that makes television such an indispensable medium. N. Minow, J. Martin & L. Mitchell, supra at 6. See D. Boorstin, The Americans: The Democratic Experience 397 (1973) (Television has "democratized experience" with "dizzying speed."); The Future of Content Regulation in Broadcasting, supra, note 9, at 581 n.202; Weaver, "Newspaper News and Television" in Television as a Social Force, supra at 94 (Television is the "most powerful centralizing - democratizing machine ever let loose in American society....").

Denying the deaf access to television thus denies them the necessary information to make important political decisions as well as linkage with their governmental representatives. Without access to the "most powerful democratizing" medium in the nation, the deaf are being denied their right to and responsibility of self-

government.

This right is the cornerstone of our constitutional system and requires an informed and active citizenry. Red Lion Broadcasting Co. Inc. v. FCC, 395 U.S. 367, 392 (1969); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion...is a fundamental principle of our constitutional system."); Richmond Newspapers v. Virginia, 448 U.S. 555, 587-88 (1980) (The First Amendment "embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government...."); Herbert v. Lando, 441 U.S. 153, 183 n.3 (1979); Garrison v. Louisana, 379 U.S. 64, 74-75 (1964) (Informational and associational accessibility are the "essence of self-government.").[11]

Thus the right and necessity of receiving information is crucial and is protected by the First Amendment.[12]

In Red Lion this Court recognized that the right to receive information was of "paramount" importance in the broadcast media:

[T]he people as a whole retain their

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[11] Philosophers as well as jurists have long recognized the crucial importance of self-government and its dependence on an informed and involved citizenry. Alexis de Tocqueville wrote of 19th century America that a diverse and widely separated people needed a means of daily association in order to insure that democracy flourishes. He recognized that the print medium (the only major communication medium at that time) was the only way of creating that association; it not only protected freedom, but maintained civilization. A de Tocqueville, 2 Democracy in America 119, 120 (Paris 1835, reprinted 1945).

[12] The right to receive information (as well as the right to speak) is well-established as a First Amendment right. Stanley v. Georgia, 394 U.S. 557, 564 (1969); Winters v. New York, 333 U.S. 507, 510 (1948); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

The public interest standard of the Communications Act necessarily invites reference to First Amendment principles. Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. at 122. For a discussion of the public interest standard and how it applies to this case, see, infra, at § I.C..

> interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount, . . . it is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or the FCC.

395 U.S. at 390.

Since the deaf are a discrete part of the television's viewing public, they thus have a "paramount" interest in receiving information from television for effective self-governance. This right, protected by the First Amendment, is sacrosanct and must not be ignored.

In light of the fundamental interests sought to be protected on behalf of the deaf, amici suggest that the relief ordered by the Court of Appeals is extremely modest. The question then, is whether, in order to protect the vital First

Amendment rights of the deaf to receive information, the Communications Act compels the FCC, at a minimum, to hold a hearing once allegations have been properly made that a public television station has virtually excluded the deaf and hard of hearing from effective viewing of its broadcasts. To state the question is to answer it.

C. The Public Interest Standard of the Communications Act Compels the FCC to Investigate the Exclusion of the Deaf from the Use of Public Television.

Almost fifty years after the passage of the Communications Act and thirty-five years after the arrival of television, the deaf are the only segment of American society still denied access to the medium's aural message. The FCC has failed to meet the mandate of the Act's public interest standard and has therefore failed to meet its legal obligations under the Act.[13]

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[13]The special needs of the deaf, discussed, supra, at § I.A., should be considered in addition

In order to understand why the FCC is minimally compelled to hold a hearing in this matter, consideration of the Act's public interest standard is necessary.

The Act requires that "the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application . . . . " 47 U.S.C. § 309(a) (1976).

This Court has recognized that "[t]he avowed aim of the Communications Act of 1934 was to secure maximum benefits of radio to all the people of the United

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to the general national policy to bring the handicapped into the mainstream of society, as expressed in such legislation as White House Conference on Handicapped Individuals Act of 1974, 29 U.S.C. § 701 note (1976), and the Education for All Handicapped Children's Act, 20 U.S.C. § 1401 et seq. (1976), and the specific national policy to prohibit discrimination against the handicapped by recipients of federal financial assistance, such as public television stations, 29 U.S.C. § 794 (1976). See Brief for Respondents for a discussion on this national policy.

States." National Broadcasting Company, Inc. v. United States, 319 U.S. 190, 217 (1934) (emphasis added). See FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 785 (1978) (The notion of public interest encompasses many factors, including the widest dissemination of information possible.).

The public interest standard has been specifically applied to minority group access issues. As the court below recognized, the Commission's obligation under the standard includes the requirement "to protect the interests of minority groups previously excluded from full access to broadcast programming." Gottfried v. FCC, 655 F.2d 297, 309 (D.C. Cir. 1981).

Concern over medium issues directly affecting television accessibility has triggered the Act's public interest standard. In West Michigan Telecasters, Inc. v. FCC, 460 F.2d 883 (D.C. Cir. 1972),

a licensee sought to move a station, potentially depriving 89,182 people of that service and reducing their channel choices to two. The court ruled that the loss of service was prima facie inconsistent with the public interest. Id. at 890. Cf. Office of Communication of United Church of Christ v. FCC , 359 F.2d 994, 1004 (D.C. Cir. 1966) (Justice Burger noting that public participation is especially important when a community is served by only one outlet). The deaf, of course, seek simple entree and do not even have the luxury of losing service or having service outlets reduced.

The standard has been correctly applied not only when viewing accessibility has been affected directly but also indirectly. In Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977), Los Angeles Women's Coalition, Etc. v. FCC, 584 F.2d 1089 (D.C. Cir. 1978), and Bilingual Bicultural Coalition, Etc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978), women and other

minority petitioners were not directly denied viewing access, but rather equal employment opportunities by the licensees. The Court of Appeals found that licensees who engage in such employment discrimination violate the Act's public interest standard. 584 F.2d at 1092, 595 F.2d at 628.

Although this Court has not had an occasion to decide the question before it now, its earlier decision in NAACP v. FPC, 425 U.S. 662 (1976), gives some direction. In concluding that alleged discriminatory employment practices of regulatees were not subject to the Federal Power Act's public interest mandate, the Court contrasted the purpose of the Power Act (to encourage orderly development of electricity and natural gas) with that of the Communications Act, which is intended to foster full use of the telecommunications media. The Court found this difference to be significant,

noting that regulations adopted by the FCC to prevent employment discrimination were "justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . . " 425 U.S. at 670 n.7 (emphasis added).[14]

Since the public interest standard obligates the Commission to serve the public for the purpose of maximizing benefits of television to all Americans, the standard also compels the FCC to hold a hearing in this case. The deaf are not invoking

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[14]Petitioner FCC cites to FCC v. WNCN Listeners Guild, __U.S.__, 101 S. Ct. 1266 (1981), in support of its argument that the courts ought to defer to FCC expertise. Brief for the FCC at 33-34, 42, 43. The issue in that matter is entirely distinguishable from the issue here. The FCC, after receiving public input, had issued a policy statement indicating that format change was essentially a matter for market determination and therefore did not trigger the public interest standard. This Court noted that the material issue was one of journalistic discretion and therefore the FCC's reluctance to restrict that discretion was well-founded. 101 S. Ct. at 1275. The matter at hand is considerably different; neither the tastes of the viewers nor what is broadcast is questioned, but rather whether a segment of the population has access to any programming at all.

the standard to challenge employment policies or to question specific program content but rather to ask why they have no access at all. If the standard does not compel the determination of this issue, then it is of little value.

II.

THE COURT OF APPEALS CORRECTLY GRANTED LIMITED RELIEF IN RECOGNITION OF ITS PROPER ROLE UNDER THE COMMUNICATIONS ACT.

Once the Court of Appeals in the instant matter determined that the needs and interests of the deaf should be weighed in relationship to the Act's public interest standard and found that the FCC's refusal to do so was arbitrary, it properly granted relief. The order was a narrow one, merely requiring the FCC to hold a hearing to assess the public station's willingness to provide programming accessible to its deaf viewers. The order was thus carefully circumscribed to insure that the FCC was free to exercise its discretionary power.

While the order is fully consistent with the role of the Court to insure that the FCC accepts its responsibility to implement the Act's public interest standard, it also properly defers to the FCC's expertise and discretion in its implementation of the standard.

A. Relief was Granted in Recognition of the Court of Appeals' Proper Role to Insure that the FCC Carries Out the Mandates of the Public Interest Standard.

Requiring the FCC to conduct a hearing in this matter is in keeping with the proper role of the judiciary to prod the FCC to accept its responsibility under the public interest mandates of the Act. On several occasions, the Court of Appeals has ordered the FCC to conduct further proceedings to gather evidence when it was found to be shirking its public interest obligation.

In Office of Communication of United Church of Chirst v. FCC, 359 F.2d 994

(D.C. Cir. 1966), when an acceptable showing of misconduct on the part of a broadcaster had been made and the FCC nevertheless refused to grant a hearing based on its "pious hope . . . for better things" from the broadcaster, the court granted relief concluding that such a hope, in light of the circumstances, was "not a substitute for evidence and findings." Id. at 1008.[15]

In Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977), the FCC refused to conduct a hearing in the face of contested claims regarding the equal employment performance of a licensee.

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[15] Part of the court's reasoning in the case is apropos to this case:

> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorney generals is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.

359 F.2d at 1003-04.

The court concluded that a hearing was required to insure "a more meaningful accounting for conduct during the contested license period and more exacting standards for the future." Id. at 65. The court again condemned the FCC's "curious neutrality-in-favor-of-the-licensee" which it had previously noted pervades the FCC in its proceedings involving challenges to license renewals Id.[16]

These decisions as well as the instant one do not represent, as petitioners would have this Court believe, unwarranted intrusions into the exclusive province of the FCC. The decision below merely reflects the traditional role of the courts to step in whenever the FCC, as an administrative agency, has acted, as it has done so here,

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[16]The Court of Appeals has ordered the FCC to conduct further proceedings when the FCC has refused to do so under similar circumstances. E.g., Los Angeles Women's Coalition for Better Broadcasting v. FCC, 584 F.2d 1089 (D.C. Cir. 1978); Bilingual Bicultural Coalition Etc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978).

arbitrarily or capriciously or has abused its discretion. 5 U.S.C. § 706(2)(A) (1976). The Court of Appeals acted with great restraint and moderation and its decision should be upheld.

B. The Limited Nature of the Relief was in Recognition of the Court of Appeals' Proper Role to Defer to the Expertise and Discretion of the FCC.

The decision of the Court of Appeals went to great lengths to make it absolutely clear that the court was "not presum[ing] to intrude into the Commission's range of discretion in this difficult area." Gottfried v. FCC, 655 F.2d 297, 310 (D.C. Cir. 1981). Indeed, the court required the FCC to "proceed with the sensitivity to the situation of its licensees," and noted that a properly conducted inquiry would "impose no unreasonable burden on the station." Id. The court went further, concluding that the "ultimate decision," in "choos[ing] among

a variety of dispositional alternatives", was "for the Commission, with its special expertise concerning what can reasonably be expected of a public broadcaster within the context of current technology and current needs." Id. at 311-12.

The Court of Appeals' deference to the "special expertise" of the FCC is entirely in keeping with the holdings of this Court in FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (program format changes), and FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (common ownership of multiple media). It is of note, however, that in those cases, where FCC policy decisions were upheld, the FCC had first conducted extensive proceedings that included solicitation and receipt of public comment. Thus, FCC action was taken only after it had considered the relevant factors and rationally weighed competing policies.

In this case, both the substantive issue and the procedural posture are far different. Beyond the fact that the question here is much more basic, i.e., inaccessible programming rather than program content or quality, there has been no solicitation of public input and no hearing in which all relevant factors and competing interests and policies could be brought before the Commission. Thus, there has been no rational weighing or even "consideration of all relevant factors," as required by the public interest standard. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

A full FCC hearing would be the appropriate place for the public broadcaster to attempt to demonstrate its good faith efforts to provide programming for the deaf or to explain its reasons for not initiating such efforts. There is, for example, no evidence in the record that would support the public station's claims

that providing accessible programming will interfere with the rights of either the hearing viewers or the station itself.[17]

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[17] Any agruments that provisions of access would be unduly burdensome either to the station or to hearing viewers, see, e.g., Brief for FCC at 38, Brief for KCET at 34 n.24, are purely speculative. This is so because there have been no systematic studies done to ascertain the extent or significance of either the annoyance or cost burden of visual clues. As for the distraction of visual clues, evidence was presented with the petitions below that tended to show that hearing viewers were not averse to open captioning. Gottfried v. FCC, 655 F.2d at 305. In addition, it is not clear whether other types of visual clues, e.g., signing, cause significant annoyance or even whether the impact may vary depending on the nature of the program, e.g., dramatic, news, sports, or variety shows. Certainly, closed captioning presents no question of annoyance at all. As for the cost burden, there is no evidence that the costs of providing captioning or other visual clues has as yet had an adverse effect on either the quality or quantiy of public broadcasts. The costs of providing visual clues can be very small. For example, the use of a sign language interpreter would represent an insignificant cost even for an inexpensive production. In amici's experience, interpreter fees typically average less than $20 an hour.

An argument has been presented before this Court that making programming accessible to the deaf will interfere with the broadcasters' First Amendment rights to be free from program content regulation. Joint Brief of Intervenors ABC, Inc., et al. at 47-51. Requiring that a public broadcaster make its programming accessible to the deaf is simply not regulation of program content and therefore this First Amendment argument is specious.

Both the lack of evidence in the record regarding the good faith efforts of the public broadcaster to provide accessible programming and the speculative nature of any annoyance and cost burden fears point up the utter deficiency in the position of the FCC and the public station in this matter. That position, so far as it is sought to be rationalized on a factual basis, is wholly without support. Only by way of a full hearing can the respective positions of the parties be found to be legitimate or not and thus their interests protected.

CONCLUSION

There is one basic and undeniable issue in this case: although television has become the most powerful and potentially beneficial communication medium in the world, the deaf, who are isolated from

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In any case, a public broadcaster does not have such a right since it is effectively the government, not a private party. CBS, Inc. v. Demo. Nat'l Comm., 412 U.S 94, 149 (1973) (Douglas, J., dissenting).

the mainstream of society perhaps more acutely and completely than any other group because of a communication barrier, are still denied its benefits and thus simply seek to enjoy them.

Television not only enhances life, but in fact provides necessary educational, cultural, social and governmental information to the American viewing public. It is access to this information that the deaf seek.

Amici ask this Court not to lose sight of the fact that the Court of Appeals acted in a moderate and restrained manner, entirely consistent with statutory law and legal precedent. Indeed, the relief sought in this case is extremely modest in light of the special but neglected needs of the deaf. The deaf, after all, are asking only for what other Americans have long taken for granted. The Court of Appeals has granted relief in recognition of this long-standing neglect.

For the foregoing reasons, amici request this Court to affirm the judgment below.

Respectfully submitted,

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May 15, 1982

Docket Sheet

NO. 81-298-CFX (Vide: 81-651, 81-799)	TITLE Community Television of Southern California, Petitioner v. Sue Gottfried, et al.

DOCKETED	COURT
Aug. 14, 1981	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Edgar F. Czarra, Jr., Charles M. Firestone
	Counsel for Respondents: Abraham Gottfried, Timothy B. Dyk, Charles M. Firestone, Carl R. Ramey, Stanley Fleishman
Aug. 14, 1981	Petition for writ of certiorari filed. (Record filed)
Sept. 3, 1981	Order extending time to file in opposition until 10/16/81 filed.
Sept. 8, 1981	Order extending time for respondents to file brief in opposition until 10/16/81 filed.
Oct. 5, 1981	Order further extending time to file a response to the petition until Nov. 26, 1981, FOR ALL RESPONDENTS.
Nov. 25, 1981	Motion of Corporation for Public Broadcasting, et al. for leave to file a brief as amici curiae filed. (Also in 81-799)
Nov. 30, 1981	Brief for the respondents in opposition filed. (Vide: 81-799)
Nov. 27, 1981	Order extending time for the government to file a response to the petition until Dec. 7, 1981. (further extension).
Dec. 3, 1981	Brief for the Federal Communications Commission in support of the petition filed.
Dec. 9, 1981	DISTRIBUTED. 1-8.
Dec. 11, 1981	Reply brief for the petitioner filed. (D).
Jan. 11, 1982	The motion of Corporation For Public Broadcasting, et al for leave to file a brief as amici curiae is GRANTED. In No. 81-298 the petition for writ of certiorari is GRANTED limited to Question 2 presented by the petition. In No. 81-799 the petition for writ of certiorari is GRANTED.

Feb. 3, 1982	Motion of the Solicitor General to consolidate Nos. 81-298 and 81-799 for briefing and oral argument filed.
Feb. 8, 1982	DISTRIBUTED. 2-19. (Above motion).
Feb. 16, 1982	Response by respondents to above motion of Solicitor General filed.
Feb. 22, 1982	The motion of the Solicitor General to consolidate this case with 81-799 for briefing and oral argument is GRANTED.
Feb. 24, 1982	Order extending time to file the appendix and petitioner's brief on the merits until March 11, 1982.

(Over)

81-298

Title

No.

DATE	PROCEEDINGS AND ORDERS
March 10, 1982	Order further extending time to file the joint appendix and petitioner's brief on the merits until March 25, 1982
March 15, 1982	Motion of respondents to order FCC to advance costs filed. (Also in 81-799).
March 19, 1982	Opposition file by the Solicitor General to motion of respondents or order FCC to advance costs filed.
March 25, 1982	Brief for petitioner Community Television of Southern California filed. (Vide: 81-799)
March 25, 1982	Brief for respondent CBS Inc., in support of petitioners filed. (Vide: 81-799).
March 25, 1982	Joint appendix filed. (Vide: 81-799).
March 25, 1982	Brief for Federal Communications Commission filed. (Vide: 81-799) (Petitioner in 81-799).
Mar. 30, 1982	DISTRIBUTED. 4-2. (Motion of respondents to order FCC to advance costs).
Apr. 5, 1982	The motion of respondents to apportion advancement of funds for the printing of the joint appendix is DENIED.
Apr. 8, 1982	Motion of petitioners for divided argument and for additional time for oral argument filed. (Also in 81-799).
Apr. 16, 1982	Order extending time to file the respondents' brief on the merits until May 15, 1982.
Apr. 19, 1982	The motion of petitioner for divided argument and for additional time for oral argument is GRANTED. Ten additional minutes are allotted for that purpose.
Apr. 22, 1982	Motion of respondents for divided argument and for additional time for oral argument filed. (Also in 81-799).
Apr. 28, 1982	Order further extending time to file the respondents' brief on the merits until June 4, 1982.
May 3, 1982	The motion of respondent for additional time for oral argument is GRANTED and ten additional minutes are allotted for that purpose. The request of respondents for divided argument is DENIED.
May 26, 1982	Brief, amici curiae, of The Deaf Counseling, Advocacy and Referral Agency, Inc., et al. filed. (Vide: 81-799).
June 7, 1982	Brief for respondents Sue Gottfried and The Greater Los Angeles Council on Deafness, Inc. filed. (Vide: 81-799).
June 7, 1982	Motion of respondents to reconsider order denying motion for divided argument filed. (Also in 81-799).
June 14, 1982	The motion of respondents to reconsider order denying motion for divided argument is DENIED.
Aug. 5, 1982	CIRCULATED.
Aug. 20, 1982	Reply brief for petitioner Community Television of Southern California filed. (Vide 81-799)

NO. 81-298-CFX	TITLE Community Television of Southern California, Petitioner v. Sue Gottfried, et al.

DOCKETED	COURT
Aug. 14, 1982	United States Court of Appeals for the District of Columbia Circuit, et al.

DATE	PROCEEDINGS AND ORDERS
Sept. 17, 1982	Reply brief for the Federal Communications Commission filed. (D). (Vide: 81-799).
Oct. 12, 1982	ARGUED.